

No. 6205

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JAMES D. MAHE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

THE KANSAS CITY SOUTHERN RAILWAY
COMPANY AND THE TEXARKANA &
FORT SMITH RAILWAY COMPANY,
PETITIONERS,

VS.

ROAD IMPROVEMENT DISTRICT NO. 6, OF
LITTLE RIVER COUNTY, ARKANSAS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS AND
BRIEF THEREON.

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INDEX.

	Page
Petition for Writ of Certiorari	1
The Facts	9
Questions Involved	13
Brief in Support of Petition for Certiorari.....	19
Abstract of the Testimony	24
Conclusion	55

Citations.

Act of Arkansas, 1915, p. 1405	46
Ahern v. Bd. Imp., 69 Ark. 68	44
Arkansas Constitution, Sec. 28, Art. 7.....	52
Board Imp. Dist. v. Pollard, 98 Ark. 543.....	42, 43
Bush v. Branson, 248 Fed. 377	22
Cache R. D. v. Ry., 255 Ill. 398	38
Chatham Co. v. Seaboard Air Line, 133 N. C. 216.	51
C. R. I. & P. Ry. Co. v. Road Imp. Dist. No. 1, 209 S. W. 725	31, 36
C. M. & St. P. Ry. v. Phillips, 111 Iowa, 377.....	51
City of Bridgeport v. N. Y., 36 Conn. 255	54
City v. Ill. Cent. R. R. Co., 263 Ill. 589.....	38
Cribbs v. Benedict, 64 Ark. 555	35, 40
Detroit v. Grand Rapids, 106 Mich. 13	54
Ft. S. Light & T. Co. v. McDonough, 119 Ark. 254	43
Gast Realty & Imp. Co. v. Schneider, 240 U. S. 55	32, 48
Gregg v. Board, 84 Ark. 390	45
Hancock v. City of Muskogee, 249 U. S. 269	33

INDEX.

	Page
Herden v. Vaught, 97 Ark. 234	50
Imp. Dist. No. 1 v. St. L. S. W. Ry. Co., 99 Ark. 508	45
Jones v. Pine Bluff, 49 Ark. 202.....	45
K. C. P. & G. Ry. v. Water Works Imp. Dist., 68 Ark. 376	43, 44
Kauffman v. St. Francis D. D., 83 Ark. 54.....	44
Kirst v. Street Imp. Dist., 86 Ark. 1.....	40, 42, 43, 46
L. & N. Ry. v. Barber, 197 U. S. 430.....	38, 50
Mo. Pac. Ry. v. Conway Co. B. Dist., 134 Ark. 292	36
Moore v. Bd. Directors, 98 Ark. 113	44
N. Y. N. H. & H. Ry. v. Fort Chester, 134 N. Y. S. 883	37
Oates v. Cypress Creek D. D., 135 Ark. 149.....	36
Peay v. L. R., 32 Ark. 31	45
Philadelphia v. Philadelphia, etc., 33 Pa. 43.....	54
Rector v. Bd. Imp., 50 Ark. 116	41, 42
Road Imp. Dist. v. Glover, 86 Ark. 231	45
St. L. & S. F. R. R. Co. v. Bridge Dist., 113 Ark. 493	36
St. L. S. W. Ry. Co. v. Red River Levee Dist., 81 Ark. 562	44
Salt Co. v. Iberia, 239 U. S. 478.....	33, 48
Sec. 1, of 14th Amendment to Constitution of U. S.	19
Swepton v. Avery, 118 Ark. 303	43
Union Tank Line v. Wright, 249 U. S. 275.....	39, 48

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**PETITION FOR WRIT OF CERTIORARI TO THE
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*To the Honorable, the Supreme Court of the United
States:*

The petition of The Kansas City Southern Railway Company and The Texarkana & Fort Smith Railway Company, corporations, and hereinafter referred to as petitioners, shows to this court as follows:

The petitioner, The Kansas City Southern Railway Company, in connection with the petitioner, The Tex-

arkana & Fort Smith Railway Company, operates a line of railroad extending from Kansas City in the State of Missouri, to the Gulf of Mexico, at Port Arthur in the State of Texas. The Texarkana & Fort Smith Railway Company is jointly interested in said railroad property with The Kansas City Southern Railway Company, and the line of railroad referred to is operated as one line of railroad, and the interest of the petitioners in said operation and ownership is joint, so that said petitioners are necessary parties herein. The line of railroad so operated extends through the States of Missouri, Kansas, Arkansas, Oklahoma, Texas and Louisiana, and is engaged in Interstate Commerce, and said line of railroad so engaged, passes through the territory hereinafter referred to as Road Improvement District No. 6 of Little River County, Arkansas.

The respondent is a Road Improvement District, organized under Act 338 of the Acts of Arkansas of 1915. See Acts 1915, p. 1400. It is located in the northern part of Little River County, Arkansas, and contains about 28,000 acres of land, about one-half of which is unimproved, includes one small village called Wilton, and 9.7 miles of the said road of petitioners. The questions involved are whether this small improvement district, being about seven miles by six and one-half miles in extent may, in the construction of a highway, which with branches, has a length of only eleven miles, levy against the property of petitioners, assessments called benefits amounting to \$67,900.00, without denying to the petitioners the equal protection of the law and depriving

them of their property without due process of law, contrary to Section One of the Fourteenth Amendment to the Constitution of the United States, and without said assessments being a burden upon petitioners' interstate commerce, in violation of Section 8 of Article One of the Constitution of the United States.

Acting under the authority of said Alexander Law (Acts of Arkansas, 1915, p. 1400), the land owners organized the respondent as a Road Improvement District, the necessary petition being filed (Tr. 1), and the County Court, the organizing agency under said law, making the necessary orders (Tr. 65). Under said Act (Section 4, p. 1406 of said Acts of 1915), the improvement district became a body politic and corporate, and could sue and be sued. The said Act authorized the construction of said highway as a local improvement to be built by the assessment of benefits against the property to be benefited, the assessments to be levied against the real property in the district according to the benefits received. Assessors were duly appointed (Tr. 39), and they made assessments of which petitioners now complain, and filed their assessments in the County Court where the said Act required they should be filed, and where, under the Act a judicial hearing might be had as to the legality, fairness and validity of said assessments. In pursuance to the terms of said Act, the petitioners appeared in the County Court, and by their pleading (see pages 46, 54 and 72 of Transcript), asserted in said court that said assessments as made were unjust, unfair, illegal, confiscatory and void, and that said assessments so made denied to the

petitioners the equal protection of the law, and deprived them of their property without due process of law, contrary to Section One of the Fourteenth Amendment to the Constitution of the United States, the petitioners insisting in said court that said acts of the assessors in making said assessments under the authority of said Act of Arkansas were repugnant to said Section of the Federal Constitution. The petitioners also asserted that their property would not be enhanced in value by, and would receive no benefit whatever from, the construction of said highway. The County Court of Little River County, Arkansas, denied the contention of the petitioners, and confirmed said assessments (See Tr. p. 89). In the manner and within the time required by law (Tr. p. 180), the petitioners appealed from said order of the County Court to the Circuit Court of Little River County (Tr. pp. 188-190), where a trial anew was had. In the trial anew in the Circuit Court of Little River County, evidence was introduced by the petitioners, to sustain their contentions that said assessments were confiscatory, illegal and void, and discriminatory, in violation of their rights under Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and that said assessments as made were a burden upon interstate commerce. This evidence and the proceedings in the Circuit Court appear in the transcript hereto attached and made a part hereof, beginning on page 164 and ending on page 315. An abstract of this testimony is fully set forth in the brief on this petition. Upon said hearing, the Circuit Court of Little River County affirmed the judgment of the County

Court of Little River County, and thereby denied to the petitioners their rights and the equal protection of the law, claimed under the Sections of the Constitution of the United States herein referred to. Thereupon, in said Circuit Court, the petitioners filed a motion for a new trial, which was overruled, to which overruling the petitioners excepted. Within due time, and in the manner provided by law, the petitioners appealed said cause to the Supreme Court of the State of Arkansas. See page 312 for the motion for new trial. See page 314 of transcript for prayer for appeal to the Supreme Court of Arkansas, and for granting of the appeal. See page 318 for the filing of the transcript in the Supreme Court of the State of Arkansas.

The said cause came on for hearing in the Supreme Court of Arkansas on July 14, 1919. On that date the said Supreme Court of Arkansas affirmed the judgment of the Little River Circuit Court, and thereby denied to the petitioners the equal protection of the law, and deprived them of their property, contrary to Section One of the Fourteenth Amendment to the Constitution of the United States, and thereby in effect held that the said assessments herein referred to were not a burden on interstate commerce.

Within the time allowed by law the petitioners in said Supreme Court of Arkansas filed a petition for rehearing. See Transcript, page 330, for said petition for rehearing. The said petition for rehearing came on for a hearing on September 22, 1919, and on that day was taken under advisement by said court. On September

29, 1919, said Supreme Court of Arkansas denied said petition for a rehearing. See page 336 of Transcript. In the opinion of said Supreme Court of Arkansas (See Tr. 321 to 328), which opinion was handed down by a divided court of three to two, two of the justices of the Supreme Court dissenting, the said court held that the evidence was sufficient to show that the assessment of benefits complained of was correct and fair. The said court held that the evidence adduced by the respondent tended to show that the assessments were fair and uniform. Said court (327) refused to discuss the testimony in detail, but held that it was legally sufficient to sustain the judgment of the Circuit Court. The said Supreme Court of Arkansas thereby in affirming the judgment of the Circuit Court of Little River County denied to the petitioners the equal protection of the law under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and also deprived the petitioners of their property without due process of law, contrary to said section of the Constitution of the United States, and also in effect held that said assessments so made were not a burden upon interstate commerce.

In all of said proceedings and through all said courts, the petitioners asserted that the undisputed evidence showed that said assessments were unequal, unjust, discriminatory and confiscatory, in violation of the petitioners' rights under the Constitution of the United States. The only authority upon which said assessors made said assessments was that found in Section 11 of said Act 338 of Arkansas of 1915. See Acts of Ar-

kansas, 1915, p. 1412. Throughout said proceedings the petitioners claimed and asserted that the assessment of said benefits made under said law of Arkansas was repugnant to the sections of the Constitution of the United States above referred to. Under said Section 11 of said Act the assessors were required to assess benefits to be received by railroads by the construction of said highway. They were required to use "the present assessed value of said railroad."

The petitioners asserted that under the facts hereinafter set forth, and which are undisputed in the record, there could be no benefits accruing to the property of the petitioners by reason of the construction of said highway, and further that in the application of said statute the said assessors unlawfully discriminated against the property of the petitioners.

The said law (Act 338 of 1915) of Arkansas authorizes the construction of a highway under an improvement district system, and specifically authorizes the construction of said local improvement by the assessment of benefits against property to be benefited. Under the laws of Arkansas local improvements may be legally made by the organization of local improvement districts only upon the ground that the real property assessed is enhanced in value in an amount at least equal to the assessments made against the property (*Rector v. Board of Improvement*, 50 Ark. 116). It is well settled in Arkansas that only real property may be assessed with benefits for the construction of local improvements, such as the one in controversy (*Snetzer v. Gregg*, 129 Ark.

542). Notwithstanding that only real property may be assessed with benefits for the construction of a local improvement in Arkansas, said assessors assessed a part of the personal property of the petitioners levying said assessments against said personal property and the use of petitioners' property, regardless of whether it was located outside of or in the State of Arkansas.

The majority of the petitioners' property and line of railroad is located outside of the State of Arkansas, and notwithstanding that, said assessors in making said assessment, included therein a part of the petitioners' personal property and a part of their other property located outside of the State of Arkansas. Under the law of Arkansas (Kirby & Castle's Digest, Sections 8552 to 8574), the franchise value and other intangible values, including the going value of a railroad company is assessed for taxation. In arriving at the value of the property within the state "the total value of the entire property of the corporation, tangible and intangible" must be included. This necessarily includes the personal property. In addition, all personal property, including materials, stores, rolling stock, locomotives, passenger cars, dining cars, mail cars and all other classes of cars are included. The statute also says that there must be included "the franchises, privileges and everything of any character whatever, situated upon the right of way of the road connected with or appertaining to it in any way, which adds to its earning power, or gives the railroad value as an entire going thing."

The undisputed proof shows that the assessors therefore, included in their assessments against the petitioners, their personal property, intangible values and going value. Therefore, the assessors assessed the use of petitioners' property instead of assessing the physical property within the district, as required by the law.

The Facts.

As shown above, this improvement district is a very small one, and contains about 28,000 acres of farm lands, about half of which is in cultivation. The territory included, on an average is about seven miles north and south and six and a half miles east and west. Two of the large land owners who are promoters of the organization, and who became commissioners, have lands located in the northern part of the district, near Little River, which lands will be, according to their evidence, greatly benefited. The district is so laid out as to include 9.7 miles of the road of the petitioners. The length of highway to be built is only about eleven miles. It runs from Ashdown in the southern part of the district, to the small village of Wilton, which is about the center, and then one branch extends to Little River on the north, a distance of about three miles, and another branch leads from Wilton to the west three miles, and then north one mile.

The prime purpose of the construction of a highway seems to be to give to the lands, a large acreage of which are owned by the commissioners, and which are located north and west of Wilton, additional means of transportation to Wilton and Ashdown. There are

other lines of railroad passing through Ashdown, but the petitioners' line of road is the only road located within the district. The Town of Wilton is the only station on the petitioners' line in the district. The boundaries of the district and the petitioners' line of railroad therein are clearly shown on the map following page 16, and especially on the maps following page 311. As will be shown by referring to the assessments on pages 100 to 157, the commissioners in assessing the lands, disregarded all improvements located on the lands, although the statute (Section 2, page 1405, Acts of 1915) required all improvements on the lands to be considered as real estate. The assessors, acting under the supposed authority of said Act 338, divided the improvement district into five zones. These zones are shown on the second map following page 311. In laying out the zones it happened that the line of railroad of the petitioners falls in zone 1, almost exclusively. The lands in zone 1 were assessed at \$12.00 per acre; zone 2, \$10.00 per acre; zone 3, \$8.00 per acre; zone 4, \$6.00 per acre and zone 5 at \$4.00 per acre. In assessing these lands at these figures, no consideration was given to the improvements located thereon. On the other hand, in assessing the railroad property, not only where the improvements located on the property in the district included, but in addition thereto, the personal property and intangible values heretofore named were included. Neither did the assessors in making assessments against the farm lands, consider the value of said lands. Regardless of value, and regardless of improvements, the farm lands were assessed in accord-

ance with the zone in which they were located. The average assessment on the farm lands made as above shown, is between \$7.00 per acre and \$8.00 per acre. The petitioners have in the district, acreage in their right of way and other property amounting to 130 acres. Therefore, as against the property of the petitioners, the said assessed benefits exceeded \$525.00 per acre, although the assessment was not made on the acreage basis. The said assessors assessed the petitioners' property at \$7000.00 per mile, making a total assessment of benefits against their property in said small district of \$67,900.00. Therefore, the assessment against the petitioners' property in the district is a little more than sixty-five times as great as the average assessment against the lands through which the petitioners' right of way runs. In making said assessment against the petitioners' property, it appears that they took the assessment (Tr. p. 208) for general taxation at \$33,000.00 per mile. If the petitioners' right of way and property had been assessed on the same basis as the farm lands, through which it runs, the total assessment against the property of the petitioners would not have exceeded \$1100.00. It would have been between \$900.00 and \$1100.00 instead of \$67,900.00.

There was no testimony to show that the petitioners' property would be enhanced in value in any manner whatever. The tax commissioner, the chief engineer, the general superintendent and other officials of the petitioners testified that the construction of the highway in controversy would not in any manner benefit the property of the petitioners, or enhance its value. The evidence rather

tended to show that the petitioners' property was decreased in value. At least, its market value was going downward. The respondent introduced the commissioners and the assessors, who were farmers, one of the commissioners being a merchant and a farmer, and they testified that the construction of the highway would cause the uncultivated and unimproved lands within the district to be put in cultivation, and that this probable future cultivation of said lands would result in future in the increase of farm products, and that this increase of farm products would bring additional business to the petitioners, as common carriers, and that this was the ground upon which they based their action in making said assessments. Not one of the assessors or commissioners attempted to say that the property of the petitioners would be enhanced in value.

By reason of the above facts, the petitioners claim that the action of the assessors and the courts, including the Supreme Court of the State of Arkansas, in affirming said assessments was arbitrary, unjust, unreasonable, confiscatory and void, and that said action of said assessors, commissioners and courts denied to the petitioners the equal protection of the laws, and deprived them of their property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that said assessments so made were a burden upon interstate commerce, contrary to Section 8 of Article 1 of the Constitution of the United States.

The petitioners further asserted in said courts, that their property was not benefited, and could not be benefited by the construction of said highway, and that the construction of said highway amounted to the construction of a competing line of transportation, and that said assessments as made discriminated against the petitioners, and that therefore the action of said assessors and courts was in violation of the petitioners' rights, privileges and immunities, guaranteed to them by Section 1 of Amendment 14, of the Constitution of the United States.

There was drawn in question by the petitioners in said proceedings, including the proceedings in the Supreme Court of the State of Arkansas, the right, privilege and immunity claimed by the petitioners under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the decision of said Supreme Court of Arkansas by affirming said assessments, was against said right, privilege and immunity, so set up and claimed by said petitioners under said section of said Constitution. The questions therefore involved herein, briefly stated, are :

Questions Involved.

1. Under Section 1 of the Fourteenth Amendment to the Constitution of the United States, is the respondent justified in assessing against the property of the petitioners in the construction of a highway, eleven miles in length, a total assessment amounting to \$67,900.00, including in the value of petitioners' property its fran-

chise value, certain of its personal property and its use in Interstate Commerce, thereby assessing benefits averaging in excess of \$525.00 per acre, and at the same time assessing against the adjoining lands nominal sums ranging from \$4.00 per acre to \$12.00 per acre and at an average of a little more than \$7.00 per acre, especially when the undisputed proof shows that the only claimed possible benefit which can come to petitioners' property is the probable future increase in traffic, resulting from the probable, conjectural and future improvement and cultivation of lands in said district not now in cultivation?

2. Under the facts set forth, have the lower courts denied to the petitioners the equal protection of the laws granted under Section 1 of the Fourteenth Amendment to the Constitution of the United States?

3. Are the assessments made as above indicated, a burden upon Interstate Commerce?

4. Are said assessments as above indicated, unjust, arbitrary, discriminatory and therefore invalid, depriving the petitioners of their property without due process of law, and denying to them the equal protection of the laws, and denying to them their rights, privileges and immunities granted to them by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. Is the said Alexander Law of Arkansas (Acts 1915, p. 1400), as administered by said assessors, commissioners and courts, repugnant to the said sections of

the Federal Constitution? The Supreme Court of Arkansas by its decision affirmed the action of the said assessors in making said confiscatory assessments thereby denying to the petitioners their rights under said section of the Federal Constitution.

The decision of the Supreme Court of the State of Arkansas, upon the facts and the record herein is erroneous in the following particulars:

First. The said Supreme Court of Arkansas, in affirming said assessments, erred in not holding that said assessments as made, were repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, inasmuch as said assessments illegally and in violation of said Constitution of the United States, distributes a local tax for the construction of a proposed highway arbitrarily and without just cause, and in grossly unequal proportions, thereby levying upon the real property of the petitioners, a tax grossly in excess of that levied upon similar land in the district.

Second. The said Supreme Court of Arkansas, in affirming said assessments erred in failing to hold that said assessments as made denied to the petitioners the equal protection of the laws, as guaranteed to them by Section 1 of the Fourteenth Amendment to the Constitution of the United States. The said assessments distribute the local tax for the construction of said highway arbitrarily and without just cause in grossly unequal proportions, thereby levying upon the real property of

the petitioners a tax grossly in excess of that levied upon similar lands in the district.

Third. Said Supreme Court of Arkansas erred in failing to hold that said assessments so made deprived the petitioners of their property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, the petitioners asserting that said assessments so made did deprive said petitioners of their property without due process of law, contrary to said section of the Constitution in that said assessment arbitrarily lays a local tax upon the property of the petitioners, greatly in excess of the benefits received by said property.

Fourth. Said Supreme Court of Arkansas erred in failing to hold that said assessment so levied violated Section 8 of Article 1 of the Constitution of the United States, said assessments so made being a burden upon Interstate Commerce, and said assessments imposing a tax upon the increase in the petitioners' revenue accruing from Interstate Commerce, thereby unlawfully taxing Interstate Commerce.

Fifth. The said Supreme Court of Arkansas erred in affirming the action of the Circuit Court of Little River County, and in confirming and upholding said assessments.

Sixth. Said Supreme Court of Arkansas erred in not reversing the judgment of the Circuit Court of Little River County.

Wherefore, your petitioners, because of the denial of their rights under the said sections of the Constitution of the United States above referred to, as above shown, allege that they are entitled to a writ of certiorari from this court, under Section 237 of the Judicial Code of the United States and the amendments thereto, of December 23, 1914, and September 6, 1916.

In compliance with the rules of this court, your petitioners furnish, and herewith attach as Exhibit "A" to this petition, a duly certified copy of the entire transcript of the record in this cause, including the proceedings of the court to which the writ of certiorari is asked to be directed.

Wherefore, your petitioners respectfully pray that a writ of certiorari may issue out of and under the seal of this court, directed to the Supreme Court of Arkansas, to command said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and the proceedings of said Supreme Court in said cause therein, entitled *The Kansas City Southern Railway Company and The Texarkana & Fort Smith Railway Company vs. Road Improvement District No. 6 of Little River County, Arkansas*, and numbered in said Supreme Court 5743, to the end that the said cause may be reviewed and determined by this court, as provided by the provisions of the Act of Congress known as the Judicial Code, and by the amendments thereto, including that of September 6, 1916, and that the petitioners may have such other and further relief in the

premises, as to this court may seem appropriate and in conformity to said Acts of Congress, and that the judgment of the said Supreme Court of Arkansas in said cause, and every part thereof, may be reversed by this Honorable Court.

Respectfully submitted,

THE KANSAS CITY SOUTHERN RAILWAY
COMPANY,

THE TEXARKANA & FORT SMITH RAILWAY
COMPANY,

Petitioners,

By JAMES B. McDONOUGH, *Their Attorney.*

IN THE
Supreme Court of the United States

OCTOBER TERM, 1919.

THE KANSAS CITY SOUTHERN RAILWAY CO.,
AND THE TEXARKANA & FORT SMITH
RAILWAY COMPANY, PETITIONERS,

VS.

ROAD IMPROVEMENT DISTRICT No. 6, OF LIT-
TLE RIVER COUNTY, ARKANSAS, RE-
SPONDENT.

**BRIEF IN SUPPORT OF PETITION FOR
CERTIORARI.**

This cause has been brought to this court, and is now pending here upon a writ of error granted by the Chief Justice of the Supreme Court of Arkansas. In the assignment of errors in the writ of error, petitioners have asserted that the proceedings under the authority of the Act of Arkansas, are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States. The assignment of errors is found in the transcript hereto attached. By this present petition it is sought to raise the same questions as those raised in the assignment of errors.

Some question has been raised as to whether the cause should be brought here for review by a writ of error or by a petition for a writ of certiorari. In view of the very great importance of the questions involved, it has been deemed proper to petition this court for a writ of certiorari, requesting that the record be brought into this court, and that the judgment and proceedings of the Supreme Court of Arkansas be reviewed, and that the cause be reversed. This petition for certiorari is therefore presented, because it is believed to be appropriate procedure, and in order that no question may arise as to the manner of presenting the cause to this court for review on the constitutional questions involved.

The petitioners claimed in the court below and respectfully assert here, that the assessments made by the respondent and its assessors, and which are fully set forth in the above and foregoing petition are so arbitrary, unjust and confiscatory that they deny to the petitioners the equal protection of the law, and deprive the petitioners of their property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States. The petitioners also claim that the said assessments are a burden upon interstate commerce in violation of their rights under Section 8 of Article I of the Constitution of the United States.

In our study and investigation of the subject under consideration, we have not found any assessment of benefits in an improvement district of this kind equalling the exorbitant sum assessed against the property of the

petitioners. The district is a very small one, containing about 28,000 acres of land. In round numbers, it extends approximately seven miles east and west and north and south. Notwithstanding its small territorial extent, it is so laid out as to include 9.7 miles of the right of way of the petitioners. See the maps following page 16 and page 311 of the Transcript.

The lands embraced in the district are almost exclusively farm lands, there being only one small town called Wilton, which is shown on the map. With the exception of two lots in that town, the same arbitrary rule of assessment was adopted and followed in all assessments against lands, assessing only the naked land, regardless of value or improvements. Probably 99 per cent of the lands are farm lands. Fifty per cent of these lands are in cultivation, having thereon farm houses and other improvements. Without regard to the improvement, all the lands are assessed at a fixed sum per acre, according to the zone in which the lands are located. All of these assessments against the lands were made upon the naked lands, and also without regard to the value, use or producing power of the lands. Every tract of land, whether improved or unimproved, in any particular zone, was assessed at the figure of that zone. In assessing the lands against the property of the petitioners, no regard was paid to zones. The zone map being the second map following page 311, shows that much the larger part of the petitioners' right of way is located in zone one, although in assessing the benefits, as stated, no attention was paid to the zone in which petitioners' property was located.

In making the assessments against the property of the petitioners, the assessors took into consideration the use of the petitioners' property and included in said assessments the franchise value, the going value and other intangible values. In adopting the value, as found by the Tax Commission of Arkansas, the said assessors necessarily included a part of the personal property of the petitioners, as was held in *Bush v. Branson*, 248 Fed. 377. By the plan adopted, the said assessors also included against the petitioners all the improvements on the right of way. In making the assessments against the farm lands, the assessors considered that said lands would be enhanced in value to the extent of the benefits assessed. They really make no such contention as to the property of the petitioners. It is easy to understand how the value of the farm lands would be enhanced. Said farm lands had no good highway connecting them with the larger market at Ashdown, except the line of road of the petitioners. The lands lying west and north of Wilton had no good road to enable them to come to Wilton. Two of the commissioners were large land owners in the district. These were Joel Mills and P. S. Kinsworthy. Their human interest would justify their effort to take from petitioners' property a large sum, in order to build a highway from their farm lands to a market. It is easy to understand how the farm lands would be benefited by the construction of an additional transportation line, and by the construction of good roads, enabling them to reach the markets with their farm products. On the other hand, it is not easy to

understand how this small highway, which will take away the business of the petitioners, in a measure at least, from Wilton to Ashdown, can be such a large benefit to the petitioners' property.

Briefly stated, the case is this :

The real property owners in the small district comprising 28,000 acres of land, reached the conclusion that eleven miles of highway in that district will benefit their lands by giving them new transportation line from the northern part of the country to Ashdown, the principal town in the county, and the county seat. They organize the improvement district, and divide it into five zones, and include in it 9.7 miles of the petitioners' right of way, and assess the property of petitioners at a sum exceeding \$525.00 per acre, whereas, they assessed their own lands at an average of a little above \$7.00 per acre. If the right of way of the petitioners was assessed upon the same basis as the lands through which the right of way runs, petitioners' assessment would be between \$900 and \$1100. The land owners have therefore assessed against the petitioners' property benefits to the extent of sixty-five times as much as that against their own. This enormous assessment is based upon the guess or conjecture that the construction of this eleven miles of highway in the small district will at some time in the future cause the clearing up and cultivating of some lands in the district. It is conjectured that the cultivation of these lands which are now uncultivated, will produce more farm products, and therefore the petitioners, being transportation companies, will receive a larger amount of traffic for transportation. This probable conjectural future possibility is regarded by the assessors and the courts below as a benefit.

Abstract of the Testimony.

Before discussing the questions of law further, we deem it advisable to make a very brief abstract of the testimony. This evidence begins on page 190 and ends on page 311.

E. Phelps, tax commissioner of the petitioner, was shown to possess experience in railroad work, extending over a period of twenty-seven years. At the time of the trial (193) he was tax commissioner under the United States Railroad Administration of a number of railroads. He had made a special study of improvement districts and assessments of benefits thereunder. He was familiar with the district in controversy. In his opinion the property of the petitioners would not receive any benefit whatever from the construction of the highway in controversy. He made a distinction between a probable future increase in property due to the general upbuilding of the country, and special benefits accruing to property by reason of a local improvement. The construction of this highway would not in any way enhance the value of the petitioners' property. Such a highway (197) could not enhance the value of petitioners' property. The petitioners could not do any intrastate business within the district, there being only one station within the district. Any business in the district would therefore be either interstate business, or business in part done outside of the district. Such a highway as that contemplated (200) does not confer any special, direct, local or peculiar benefit to the prop-

erty. Such a highway does enhance the value of private property contiguous to the highway. Any general community benefit resulting from the upbuilding of the community generally, would bring increased business to the petitioners. Any supposed benefit (201) to the property of petitioners would be uncertain and speculative. It could not be reduced to any certainty in figures. In his opinion the assessors in assessing the alleged benefits took into consideration speculative benefits. No one will dispute (202) that an improved modern highway will increase and improve the value of real estate, and farm land immediately in the vicinity where the highway is built. The owner of the farm can avail himself of the increase in the value of his land. He can sell the same at a better price, or rent it at a higher rental. With a railroad, it is entirely different. The right of way is not marketable. It is not for sale. The prospect of earnings of a railroad depends upon conditions extraneous to the property of the people along the line of railway. The earnings of a railroad depend upon rates which are fixed by a body other than the assessors in a highway district. If the rates under which a railroad is operating do not permit them to operate profitably, all the improvements which could be built in a community would contribute nothing to the value of the railroad (204). The benefit which comes to a private land owner is tangible. He can reach out and grasp it. As to a railroad it is problematical and speculative, so much so that it cannot be reduced to figures. A highway which will give greater facilities for transporta-

tion of commodities to market, and which increases the value of lands and the improvements thereon, does not add any benefit to the railroad. The railroad is not any more valuable in places where there are improved highways than it is in places where there are not improved highways, in the sense of benefits. The general community benefit which results from the development of the community, is compensated for in the general taxes paid by the railroads. A railroad company is compensated in paying the general tax by the protection given by the government. In an improvement district, the theory is that the benefits accruing are peculiar benefits inuring in the property. He denies that any special or peculiar benefits accrue to railroad property by the construction of a public highway. Any limited road in a limited district will not benefit a railroad. The witness then testifies that the value placed upon petitioners' land in the road improvement district is approximately \$33,000.00 per mile. Witness could not see any benefit to personal property. The construction of the road from the northern part of the county through Wilton to Ashdown, would build up a competitor with the petitioners. The land owners north of Wilton would be enabled to reach a larger town and a better market at Ashdown. Therefore, instead of the farmers giving their products to the petitioners at Wilton, they would take them to Ashdown, where they could deliver them to the Frisco or some other railroad. Passengers would be carried over the road in automobiles.

The attitude of the petitioners is not against public improvements. Their attitude is simply to resist unjust assessment of benefits against their property for the construction of these highways. Arkansas is the only state where petitioners are compelled to pay assessments for building of public roads in restricted districts. If there is any benefit to the right of way as land (212) it would only be the same benefit per acre as to the farm lands.

This witness was recalled, as is shown on page 309, and there testified that the stocks and bonds of the petitioners had fallen in value, and had been falling in value for some time.

J. H. Williams, the clerk (214), testified as to the assessments which are heretofore given. The petitioners then introduced the following witnesses:

J. M. Weir, chief engineer (220); A. Leckie, division engineer (233); E. H. Holden, general superintendent (237); J. J. Taylor, superintendent of bridges and buildings (240); J. J. Hancock, road master (245).

The testimony of these witnesses tended to corroborate the evidence of E. Phelps, showing that the property of petitioners would not receive any benefit from the construction of the highway.

Joel Mills (253), a witness for the respondent, a commissioner and a large land owner, testified that he regarded the assessment against the petitioners as "fair." He was asked to state what benefits would accrue to the railroad property (255) by reason of the improvement.

He replied that he got his information along these lines from other districts and other communities. He estimated the benefits that had accrued to other districts by reason of the good roads. He then said that the benefits accruing to a district like this one, would do as much good in five years as would ordinarily come in twenty-five years, without the improvement. It will be observed that he does not show by that statement, the accrual of any benefit to petitioners' property. He does not show any enhancement in the value of petitioners' property. After the above, he explained that certain new territory would be opened up by the construction of the improvement. Some of this was north of Wilton near Little River, and some was west of Wilton. These branches of road (256) would connect with a good lot of farming land, and timbered land that now has no facilities for getting anywhere, except to Wilton. He then argued that the construction of the steel bridge over Little River had tended to bring farm products from the territory north of Little River to Wilton, although there was no good road between Little River and Wilton. He was certain that the steel bridge and the construction of the highway would bring trade from the south end of Sevier County to Wilton. Wilton was the place of business of this witness. He does not show that that trade would be of any benefit to the petitioners. He then said that many of the people, meaning, we presume, the people in Sevier County, already did their banking business at Ashdown and Wilton. He then said that there was more territory west of Wilton to be de-

veloped than there was north. He then testified that the construction of improved highways practically put every piece of land in cultivation. It put settlers on the land and puts the land to producing something. That was done because the highway gave transportation facilities from the lands to the markets. He then said that those were the things which in his opinion brought a benefit to the petitioners. The Kansas City Southern Railway Company was a trunk line, and practically brought in all the products that came there, and took away all that they produced. At least, it got a large per cent of it. It is not shown by the evidence of this witness that the property of the petitioners would be enhanced in value in the slightest degree. All that he contends is that there would be an increase in the future business by the probable future development of the country. He thinks the highway might induce settlers to come in and put the land in cultivation. He said that 50 per cent of the land was not in cultivation, and that the highway would probably cause settlers to come in and cultivate the land. By the probable future cultivation of the land there would probably result to the petitioners an increase in business. This does not show any enhancement in value.

L. G. Ferrell, the secretary of an abstract company at DeQueen, in Sevier County, gave testimony substantially the same as that above given, except that he also added that the construction of highways in other districts had increased the value of *lands* in those districts from 20% to 50%. His evidence, as to the benefits

to petitioners' property is substantially the same as that of Commissioner Mills.

Dr. A. N. Wood (280), one of the assessors, gave testimony substantially the same as that of Commissioner Mills. Neither he nor Mills showed that they have any knowledge of railroad property. Neither of them in any way says that the railroad property will be enhanced in value. They contend that the construction of the highway will cause settlers to come in and to place the land in cultivation, and thereby additional business may be done in future by the petitioners. For that reason he considers that a benefit to the petitioners' property. He was one of the assessors that assessed all lands at a certain figure per acre, regardless of improvements, although the statute required the improvements to be considered, and at the same time assessed petitioners' property including all improvements and its use and its personal property and franchise value, as heretofore indicated in the petition *supra*.

D. C. E. May, another assessor (296), also gave testimony similar to that of Dr. Wood. He did not claim that the railroad property was enhanced in value, and said that the future cultivation of lands now not in cultivation would probably bring increased business to the petitioners, and therefore he considered that a benefit.

P. S. Kinsworthy (302), another commissioner, testified in substance the same way.

The above is in substance all of the evidence on the questions raised in the cause.

I.

The petitioners claimed and alleged in the court below, that the assessments against their property were arbitrary, unjust, unreasonable and that the administration of said improvement district law by the assessors and the courts took from the petitioners their property without due process of law, and deprived them of the equal protection of the laws, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

In view of the facts above set forth, and in view of the recent action of this court in granting a writ of certiorari in the case of *C. R. I. & P. Ry. Co. v. Road Improvement District No. 1 of Prairie County, Arkansas*, counsel for the petitioners do not deem any extended brief necessary on this petition. We have carefully read over the petition and brief thereon in said cause, *Chicago, Rock Island & Pacific Ry. v. Road Improvement District No. 1 of Prairie County*, and we find that the questions there raised are substantially the same as raised in this record. As this court granted the petition for certiorari in that case, we believe the facts above shown tend to show that the same course should be pursued in this case. If there is any difference in the two cases, the instant case is a greater illustration of confiscation and wrongful assessments than can be found in any of the reported cases. In the instant case the assessments are nearly double what they were in the Rock Island case. In all other respects the questions involved in the two cases are apparently exactly the same. While the Fourteenth Amendment to the Constitution of the United States is not in-

tended to interfere with the taxing systems of the state, yet it is well settled in this court that said amendment does protect property owners from unjust, unreasonable and confiscatory assessments of alleged benefits in local improvement district matters.

In case of *Gast Realty & Imp. Co. v. Schneider Granite Co.*, 240 U. S. 55, this court, speaking through Mr. Justice Holmes, said:

"But as is implied by *Houck v. Little River Drainage District*, if the law is of such character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact."

After some further discussion, this court, in upholding the rights of the property owners under the Fourteenth Amendment to the Constitution, as against the assessment of benefits, said:

"The differences were not based upon any consideration of difference in the benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied. The defendants' case is not an incidental result of a rule that, as a whole and on the average, may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that requires the result."

In another recent case of *Hancock v. City of Muskogee*, 249 U. S. 269, in upholding an assessment, this court said:

"We do not mean to say that if in fact it were made to appear that there was an arbitrary and unwarranted exercise of the legislative power, or some denial of the equal protection of the laws in the method of exercising it, judicial relief would not be accorded to parties aggrieved. The facts of this case raise no such question."

In support of that, the following cases were cited:

See *Phillip Wagner v. Leser*, 239 U. S. 207, 220, 60 L. Ed. 230, 237, 36 Sup. Ct. Rep. 66; *Houck v. Little River Drainage Dist.*, 239, U. S. 254, 265, 60 L. Ed. 266, 274, 36 Sup. Ct. Rep. 58; *Myles Salt Co. v. Iberia & St. M. Drainage Dist.*, 239 U. S. 478, 485, 60 L. Ed. 392, 396, L. R. A. 1918E, 190, 36 Sup. Ct. Rep. 204; *Gast Realty & Invest. Co. v. Schneider Granite Co.*, 240 U. S. 55, 59, 60 L. Ed. 523, 525, 36 Sup. Ct. Rep. 254.

In the case at bar, the undisputed facts above set forth did raise this specific question. In effect, it is precisely the same question that was decided in favor of the Salt Company in *Myles Salt Co. v. Iberia & St. L. Drainage*, 239 U. S. 478. In that case, on the subject under consideration, this court, speaking through Mr. Justice McKenna, said:

"Nothing could be more arbitrary if drainage alone be regarded. But there may be other purposes, defendants say, and, besides, that the benefit to the property need not be direct or immediate; it may be indirect, such as might accrue by reason of the general benefits derived by the

surrounding territory. But such benefit is excluded by the averments, and it certainly cannot be said that the elevated land of Weeks Island could be a receptacle for stagnant water, or would be otherwise a menace to health if not included within the district, or would defeat the purpose of the law, which seems to have been the ground of decision in *George v. Young*, 45 La. Ann. 1232, 14 So. 137.

"The case, therefore, is within the limitation of the power of the state as laid down in *Houck v. Little River Drainage Dist.*, *supra*, which cites *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep. 187, and retains its principle. It has not the features which determine *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. Ed. 879, 21 Sup. Ct. Rep. 625, and the cases which have followed that case, and *Phillip Wagner v. Leser* (239 U. S. 207, ante, 230, 36 Sup. Ct. Rep. 66), decided coincidentally with *Houck v. Little River Drainage Dist.*, and cited in the latter.

"It is to be remembered that the drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation. *Phillip Wagner v. Leser*, *supra*. We are not dealing with motives alone, but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property, but solely of the improvement of the property of others,—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind."

The assessment of the petitioners' property at \$67,900.00, including the elements of value heretofore named, and on an acreage basis, at \$525.00 per acre, and assessing the farm lands on either side at \$4.00 to \$12.00 per acre, regardless of the improvements, is so lacking in equity, justice and right as to convince one that said assessments are unlawful and attempt to deprive the petitioners of their property in violation of their constitutional rights.

II.

The conjectural and possible increase in transporting farm products resulting from the possible and probable clearing up and cultivating of unimproved lands, as a matter of law does not constitute benefits within the meaning of the Arkansas Act under discussion.

Out of this proposition there arise two questions. The first is that the evidence fails to show any enhancement in the value of the petitioners' property. The second is that, as a matter of law, the conjectural increase in future business is not a benefit within the meaning of the law.

In an early case, the Supreme Court of Arkansas seems to have so held.

In *Cribbs v. Benedict*, 64 Ark. 555, the Supreme Court of that state said:

"In estimating either the injuries or the benefits, those which the owner sustains or receives in common with the community generally, and which

are not peculiar to him and connected with his ownership, use and enjoyment of the particular parcel of land, should be altogether excluded."

Notwithstanding that view, the Supreme Court of Arkansas, in some recent cases, and especially in the instant case, has taken the view that the evidence as to this possible future growth in business might be a benefit.

Oates v. Cypress Creek Drainage Dist., 135 Ark. 149.

St. L. S. F. Rd. Co. v. Ft. S. & V. B. Bridge Dist., 113 Ark. 493.

The same court in the Rock Island case, which is cited in the opinion in the instant case at page 323, of the transcript, apparently took the same view. See *C. R. I. & P. Ry. Co. v. Road Imp. Dist. No. 1, Prairie County*, 209 S. W. 725. See also *Mo. Pac. Ry. Co. v. Conway County Bridge District*, 134 Ark. 292.

In the Rock Island case, just cited, as we have elsewhere shown, this court has already granted the petition for a writ of certiorari, and that cause is now pending in this court for review, being brought here both by writ of error and by certiorari. In the instant case, as is shown by the evidence above referred to, the facts do not bring the assessments within the rule laid down by the Supreme Court of Arkansas in the above cases. In other words, the evidence in the case at bar, in no manner attempts to show that the railroad property will in any manner be enhanced in value. In the other cases referred to from the Supreme Court of Arkansas with the

exception of the Rock Island case, probably there was at least some testimony tending to show that the railroad property was enhanced in value. In the present case the petitioners contend that there is not the slightest evidence tending to show that the petitioners' property will be benefited in the slightest degree. Even if we should be mistaken in that, it is well settled that such *possible future* increase in business does not constitute special peculiar benefits within the meaning of the law. Such possible future increase in business does not enhance the value of property, so as to constitute benefits.

In case of *N. Y., N. H. & H. Ry. v. Village of Fort Chester*, 134 N. Y. S. 883, the Appellate Division of the New York Supreme Court said:

"The only benefit that the learned corporation counsel specifically claims will inure to the railroad company from these improvements is an increase in its business following the increase in business and population resulting to the village from the improvement of its streets. This alleged benefit is too conjectural, fanciful and remote for consideration, and it seems highly improbable that the Legislature intended to tax the right of way on any such assumption. The corporation counsel's reasoning, if valid, would logically permit the taxation of any railroad right of way running through any village or city for general street improvements, however far from its right of way. Moreover, such a rule confuses the appellant's business growth with the value of its real estate."

Outside of the State of Arkansas, up to this time, we have not found any case holding to the contrary of

that doctrine. The following cases declare the same rule:

Cache River Drainage Dist. v. Ry., 255 Ill. 398.
City of Kankakee v. Ill. Cent. R. R. Co., 263
 Ill. 589, and cases therein cited.

The Supreme Court of Arkansas attempted to justify assessments against railroad property, on the theory of future benefits, by citing the case of *L. & N. Ry. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430. It is respectfully submitted that the Supreme Court of Arkansas has misunderstood the meaning of that case. This court, in that case, was not considering assessments for the construction of a highway. The question was whether the grading, the curbing and paving in a street were such improvements as would benefit the property of a railroad company. In limiting the application of the decision, this court said:

"It will be noticed that the case concerns only grading, curbing and paving, and what we shall have to say is confined to a case of that sort."

The effect of that decision is simply to hold that the *physical* property of a railroad adjoining a local improvement, such as grading, curbing and paving, may be benefited. The principle upon which the case was affirmed is that the improvements described would be a *local benefit* to the *physical property* of the company. The case, therefore, is not an authority supporting the proposition that the *right of way* of a railroad company may be benefited by the construction of a competing line of highway. On the other hand, the case seems to recog-

nize the soundness of the doctrine that a railroad right of way cannot be benefited by the construction of a public highway. This conclusion is deduced from the fact that this court refused to base its decision upon any benefit to the railroad property, *as such*. The decision was based upon a benefit to physical real property *as such*. In effect, therefore, the decision denies the contention that the use of railway property may be taxed with benefits for the construction of a public highway. It is therefore submitted that the case is an authority in support of the petitioners' contention in the case at bar.

It will be observed by this court that the assessors in this cause, arbitrarily disregarded the improvements on the real estate, although Section 2 of the Act in question requires the improvement to be included. See page 1405 of the Acts of Arkansas of 1915. The plan, therefore, of the commissioners thus indicated, was in itself, an arbitrary plan, in violation of the rights of the petitioners under the due process clause of the United States Constitution, because such plan as to lands, disregarded the improvements thereon, and at the same time as to the petitioners' property, considered and added all improvements thereon located. This plan was in itself an unlawful, arbitrary and confiscatory plan, in violation of the rights of the petitioners, as fixed by the decisions of this court under the Federal Constitution.

Union Tank Line v. Wright, 249 U. S. 275.

In that case, this court, speaking through Mr. Justice McReynolds, said:

"But if the plan pursued is arbitrary and consequent valuation grossly excessive, it must be condemned, because in conflict with the Commerce Clause or the Fourteenth Amendment, or both."

The petitioners contended that the Supreme Court of Arkansas in case of *Cribbs v. Benedict*, 64 Ark. 555, adopted the true rule on the subject under consideration. That rule is to exclude any general community benefits which may come in the future by reason of the probable increase in the cultivation and development of lands.

In still a later case the Supreme Court of Arkansas adopted a principle contrary to that adopted in the instant case.

In *Kirst v. Street Improvement District*, 86 Ark. 1, the Supreme Court of Arkansas said:

"Consideration should be given to all facts and circumstances tending to show special benefits received from the improvement not flowing to the community at large."

This declaration of the Supreme Court of Arkansas is in line with the general rule adopted in nearly all jurisdictions. It is respectfully submitted that upon the undisputed evidence, there is not a syllable of testimony to show that the property of petitioners would be enhanced in value. The only possible enhancement, and that is by inference only, would be the increase in the value of the physical land area embodied in the right of way. If that basis is accepted, the assessments would be at about \$1000 instead of \$67,900. Such would be

the result, if the same method of assessment applied to lands should be applied to the acreage of the petitioners. This shows that the assessors have unreasonably fixed upon the petitioners' property a tax which is about sixty-five times as much as the commissioners and assessors put on their own lands. The facts bring to mind the public speech of a certain candidate for legislative honors, in the state. He vehemently urged the construction of innumerable highways throughout the state. He urged that that should be done now, while the farmers could build these highways with other people's money, referring, of course, to railroads and other public service corporations. The refusal of the Supreme Court of Arkansas to set aside these assessments, approved this unlawful action of the board of assessors, and denied to the petitioners, their protection, given them by the Federal Constitution.

III.

Assessments for local improvements in Arkansas can be sustained only when the benefits equal the assessments. The benefits represent the enhancement in value in the property, produced by the construction of the improvement.

In the case of *Rector v. Board of Improvement*, 50 Ark. 116, quoting from Judge Dillon on Municipal Corporations, the Supreme Court of Arkansas said:

"Special benefits to the property assessed, that is benefits received by it in addition to those re-

ceived by the community at large, is the true and only solid foundation upon which local assessments can rest."

After quoting the above, the Supreme Court of Arkansas said:

"They are based upon the assumption that the persons, upon whose property they are imposed, are specially and peculiarly benefited in the enhancement of the value of their property by the expenditure of the money collected on the assessment; and that while they are made to bear the cost of the local improvement, they at the same time suffer no pecuniary loss thereby, 'their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay.'"

See also *Kirst v. Street Improvement Dist.*, 86 Ark. 1.

In case of *Board of Improvement District No. 1 of Fayetteville v. Pollard*, 98 Ark. 543, the Supreme Court of Arkansas reaffirmed the principle that property cannot be taken for the construction of an improvement unless that improvement specially and peculiarly benefits said property by enhancing the value of the property. After quoting from the case of *Rector v. Board of Improvement*, 50 Ark. 116, the same court said:

"The principle upon which these assessments for local improvements are made, is that by reason of the benefits received, no pecuniary loss can be suffered by the owner of the property in paying therefor. Therefore, where no benefits accrue, the property should not be made the subject of special assessment."

The same principle was announced by the Supreme Court of Arkansas in the following cases:

K. C. P. & G. Ry. Co. v. Water Works Imp. Dist., 68 Ark. 376.

Kirst v. Street Imp. Dist., 86 Ark. 1.

Ft. S. Light & Traction Co. v. McDonough, 119 Ark. 254.

In *Sweepston v. Avery*, 118 Ark. 303, the Arkansas Court said:

"The special assessments can be justified only upon the ground that the contemplated improvement is local in its nature, and that the property taxed will be specially and peculiarly benefited."

In all the cases in Arkansas, including every kind of local improvement, that court has uniformly and without dissent, always said that where the property did not receive a peculiar and special benefit, no assessment could be made against it. The Arkansas Court, in upholding that position, has unhesitatingly declared that the legislative determination of benefits by the Legislature was not at all conclusive upon the court.

In case of *Board of Improvement v. Pollard*, *supra*, on that subject the Supreme Court of Arkansas said:

"It has been held by this court that the legislative determination of the amounts and benefits to accrue to lands in improvement districts established by it is not entirely beyond judicial review; and that when such assessments are levied on property regardless of benefits, or where it is shown that no benefit can possibly accrue to the land from the improvement, relief can be sought in the courts against the collection thereof."

The following cases from the Arkansas Court declare the same rule:

St. L. S. W. Ry. Co. v. Red River Levee District, 81 Ark. 562.

Kauffman v. St. Francis Drainage Dist., 83 Ark. 54.

Moore v. Board of Directors, 98 Ark. 113.

The above rule that property cannot be assessed for a local improvement unless said property will be benefited by an enhancement in value equal to the assessment, has been applied by the Supreme Court of Arkansas to railroad property, where the local improvement was a water works or a paving or other local street improvement. In every one of those cases, however, it was conceded by the Supreme Court of Arkansas, that no assessment could be made against railroad property, even for those classes of local improvements, unless the evidence showed that such railroad property was enhanced in value by reason of the improvement.

K. C. P. & G. R. R. v. Water Works Imp. Dist., 68 Ark. 376.

Ahern v. Board of Improvement, 69 Ark. 68.

In the last case the Supreme Court of Arkansas excluded from the Improvement District a certain spur track of the railroad because there was no proof that that spur track would be benefited by the contemplated street improvement. The Arkansas court has upheld assessments of benefits against railroad property, but only upon the showing that the railroad property was enhanced in value, and was actually benefited.

Improvement District No. 1 v. St. L. S. W. Ry. Co., 99 Ark. 508. In that case, the improvement contemplated was a water works system. The court held under the evidence that the property of the railroad company would be benefited. Not only has the Supreme Court of Arkansas held that no assessments can be made where the property will not be enhanced in value, but said court with much wisdom has protected the rights of property owners by holding that the assessments must be uniform. The Constitution of Arkansas requires all taxation to be uniform. The principle of equity and uniformity as to taxation has been applied by the Supreme Court of Arkansas to special assessments for local improvements. In other words, the Supreme Court of Arkansas has held that the assessment of benefits can be levied only when the property is enhanced in value, but has also held that said assessments must be uniform, fair, just and equal.

Peay v. L. R., 32 Ark. 31.

Jones v. Pine Bluff, 49 Ark. 202.

Gregg v. Board of Improvement of Russellville, W. W., 84 Ark. 390.

Road Improvement District No. 1 v. Glover, 86 Ark. 231.

From the above cases, it is to be observed that the Arkansas Court has always protected property as against assessments for local improvements in cases where the property was not enhanced in value. Many times the question has been a serious one, as to what is an enhancement in value. If there is no enhancement in value, then there is no benefit to the property. The above cases from the Arkansas court also establish that principle.

IV.

The plan of assessment was arbitrary, unjust and confiscatory.

We do not deem it necessary to discuss that question further. The evidence in the record establishes the following:

1st. In assessing the farm lands lying on either side of the petitioners' right of way, the assessors failed to consider any use to which the lands were put, and disregarded the buildings and other improvements, although the Act of Arkansas expressly required the improvements to be included (Acts 1915, p. 1405). In *Kirst v. Street Imp. Dist.*, 86 Ark. 1, on that subject the Arkansas Court said:

"The benefits, if any, to the buildings on the land cannot be arbitrarily disregarded. There are cases holding that only the benefits accruing to the land as such should be considered, and that the enhancement in value to the buildings should not be considered. Whether those cases are right or wrong, the statute in this state contemplates that any benefit accruing to the real property, including buildings, shall be considered."

2nd. In assessing the alleged benefits against petitioners' property, the assessors disregarded acreage, and based their assessments primarily and substantially upon the use of petitioners' property, including personal property and intangible values and elements.

3rd. In assessing the property of petitioners, all improvements located on said property were considered.

4th. In assessing the petitioners' property, the assessors began with an assessment of \$33000.00 per mile, which had been assessed by the State Tax Commission of Arkansas. The value fixed by the State Tax Commission included necessarily, as determined by the statute, the use of petitioners' property located outside of the State of Arkansas. In other words, in fixing the value at \$27000.00 per mile to \$33000.00 per mile, on petitioners' property, the State Tax Commission took into consideration the use of petitioners' property in the transportation of property and passengers beyond the limits of the State of Arkansas. The assessors therefore necessarily included the franchise value and the going value of petitioners' property, and all its value derived from its use in Arkansas and in other states. This principle disregarded absolutely the acreage of the right of way of petitioners' property, and based the assessment primarily and necessarily upon the use of petitioners' property in Interstate Commerce.

5th. By reason of what is said in the last above number, it follows as a matter of law, that the said assessors included in their assessment against the property of the petitioners, a part of the personal property of petitioners, for the reason that petitioners' personal property inheres in the use of its property, and also for the further reason that the intangible values, including going value, also inhere in the value adopted by the commissioners. Therefore, the assessors used a part of petitioners' personal property and failed to use any personal property against any other tax payer, and even failed to use

against the other tax payers the valuable improvements on the farm lands. It results therefore, that the assessors, acting under the authority of said Alexander Law of Arkansas, have adopted a plan which results in assessing upon petitioners' property an arbitrary and unreasonable proportion of the cost of constructing the highway in question. It is respectfully submitted that such arbitrary action of the commissioners violates petitioners' rights under the due process clause of the Federal Constitution.

Union Tank Line v. Wright, 249 U. S. 275.

Myles Salt Co. v. Ibernia Drainage Dist., 239 U. S. 478.

Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55.

V.

The said assessments, arbitrary, unjust and unreasonable as they are, constitute an unlawful burden on interstate commerce.

The evidence in the case shows that the petitioners are engaged in interstate commerce. There is only one station in Road Improvement District No. 6, the respondent. The line of railroad runs through six different states. Therefore substantially all of its commerce is interstate. While this court will not unnecessarily interfere with the taxing system of a state, it will not hesitate to do so in a case where the taxation is in plain violation of the due process clause of the Federal Constitution, and is also a burden upon interstate commerce.

Union Tank Line v. Wright, 249 U. S. 275.

In that case, this court said :

"A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the 14th Amendment. insofar, however, as moveables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just, it need not be limited to mere worth of the articles considered separately, but may include as well 'the intangible value due to what we have called the organic relation of the property in the state to the whole system.' How to appraise them fairly when the tangibles constitute part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (*Western U. Teleg. Co. v. Atty. Gen.*), and the average amount of property habitually brought in and carried out by a car company (*American Refrigerator Transit Co. v. Hall*). But if the plan pursued is arbitrary and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the 14th Amendment or both."

After discussing other questions in the same case, it was also said :

"In other opinions of this court cited below to support the conclusion there reached, we upheld the power of a state to tax property actually within its jurisdiction upon a fair valuation considered as a part of a going concern; they give no sanction to

arbitrary and inflated valuations. Taxes must follow realities, not mere deductions from inadequate or irrelevant data."

It is respectfully submitted that the assessment for the total sum of \$67,900.00 on 9.7 miles of railroad in a district about eleven miles long, under the circumstances detailed above necessarily creates an unlawful burden upon interstate commerce.

VI.

Petitioners' property is a right of way, and therefore a mere easement.

We desire to call the court's attention to this matter, because justly a mere easement cannot be assessed in the same degree and in the same way as the fee. It is held in Arkansas that the right of way of a railroad company is a mere easement.

Herdon & Ft. S. Ry. Co. v. Vaught, 97 Ark. 234.

If the petitioners should ever abandon this right of way, the land will revert to the adjoining land owners. Therefore, the assessments cannot possibly be sustained upon the principle in *L. & N. Ry. Co. v. Barber Asphalt Co.*, *supra*. The cause does not turn upon this point, but we call the court's attention to it in order to show that there is less merit in making such exorbitant assessments against a mere easement than there is in cases where the fee is involved.

VII.

The action of the assessors, in including the improvements on petitioners' property, and including the personal property, and taking into consideration all its intangible values and its use in interstate commerce, necessarily, and as a matter of law, assesses benefits upon petitioners' personal property.

This question came before the Supreme Court of Iowa in case of *C. M. & St. P. Ry. Co., v. Phillips*, 111 Iowa, 377. In holding that the assessments made under circumstances similar to those made in the case at bar, included assessments against personal property, the Iowa court said:

"We have stated sufficiently the provisions of these sections to show that the assessments made by the executive council included personal as well as real property. The value of the personal property of such corporations forms an important factor in estimating the value of their property used in the operation of the road, and in many instances largely exceeds the value of the real estate so used. The tax in question was levied upon the valuations of plaintiffs' property assessed by the executive council, and is, therefore, in part, a tax on personal property to pay for the construction of a sewer, and to that extent is unquestionably illegal and void, as only real estate may be taxed for that purpose."

That principle applies in case at bar, and necessarily makes all of these assessments void, and thereby denies the petitioners their rights under the Federal Constitution. See also *Chatham County v. Seaboard Air Line*, 133 N. C. 216.

VIII.

The questions involved are grave and important. Can a country highway of this kind be built by local assessments levied upon a mere easement and the use of the same by railroad company? The contemplated highway is a public highway built for the use of the county and the public in general.

The shocking disparity—assessing farm lands without improvements at an average of about \$7.00 per acre, and the petitioners' right of way and property which runs through these same farm lands, at a figure amounting to \$525.00 per acre, more than sixty-five times what it ought to be upon the principle of equality and uniformity—in the assessments is alone sufficient to challenge the serious consideration of this court, because said procedure invades the petitioners' rights in violation of the Federal Constitution; but there incidentally arises on the record as a part of and as a corollary to the above questions other grave and serious questions sufficiently important to interest the sincere consideration of this court, as the solution of said questions necessarily calls for an interpretation of the clauses of the Federal Constitution above discussed.

The "local" improvement contemplated is not a gutter, sewer or a pavement in a town, but is a common public highway in the country, built for the general use of the general public, and that too, upon an agreement between the commissioners and the County Court, the latter under the Arkansas Constitution (Section 28, Article 7), having sole jurisdiction of *county roads*, that *this highway when built should be turned over to the County*

Court as a part of the public roads of the county, thus showing that the "improvement" is general and not local. On this subject there is no dispute in this record.

Under date of July 29, 1918 (See Tr. p. . .), the commissioners and the County Court, by order of the latter, expressly agreed that this road was to be constructed as a public highway, and turned over to the county. In the record of the County Court of that date appears the following:

"And whereas it is the intention of the commissioners of said district to complete said improvement as soon as practicable, and to turn the same back to the county upon its completion, which will be accepted by this court, when completed, as a part of the county highway system."

This demonstrates that the promoters of this improvement district have not only wronged the petitioners by the unfair and unjust assessments complained of, *but are using the local improvement district law for general taxation to build a highway for the general benefit of the general public.* This is all the more reason why these proceedings are repugnant to the Federal Constitution.

In *Gray on Limitation of Taxing Power*, Section 1865, on the subject of local assessments to construct highways for the general public, the author says:

"Local assessments for laying out country or suburban highways, therefore, have generally been held unconstitutional, as taking property without due process of law, and, in states where the constitution requires equality and uniformity, as lacking in those respects."

See also cases cited in Note 85 to that section. This weakness of these proceedings is emphasized by the further suggestion that the assessments in controversy are against *a railroad right of way, and the use thereof not as physical real property, but as a going concern*, used in interstate commerce, the right of way being a mere easement. It is also suggested that it is still a graver question as to whether one right of way and the use thereof belonging to a public highway, such as a railroad, can be charged with local assessments to construct a dirt highway, the latter being a competitor of the former. To assess the business of one highway for the purpose of constructing another highway seems to be taking property without due process of law. It has been held in many jurisdictions that a mere easement such as a right of way and the use thereof, *cannot as a matter of law, be benefited by a local improvement*, such as that in controversy.

Detroit etc. R. R. v. City of Grand Rapids, 106 Mich. 13.

Philadelphia v. Philadelphia etc., R. R., 33 Pa. St. 43.

It has also been held as a matter of law, that the construction of a highway parallel with a railroad company *cannot possibly enhance, either directly or indirectly, the value of the railroad property*.

City of Bridgeport v. N. Y. etc. R. R., 36 Conn. 255.

See also:

Junction Ry. Co. v. Philadelphia, 88 Pa. St. 424.

Borough of Mt. Pleasant v. B. & O. Ry., 138 Pa. St. 365.

Allegheny City v. W. Pa. Ry. Co., 138 Pa. St. 373.

Chicago etc. Ry. v. City of Ottumwa, 112 Iowa, 300.

N. J. etc. Ry. Co. v. City of Elizabeth, 37 N. J. L. 330.

See *City of Boston v. Boston etc. Ry. Co.*, 170 Mass. 95.

Matter of Town of Gates, 8 N. Y. S. 247.

Conclusion.

Upon the undisputed evidence in this record, it is suggested to the court that the questions involved are of grave and serious concern. The evidence will warrant the assertion that the land owners, through the assessors and the commissioners, are endeavoring to fix upon the property of the petitioners an unjust and unreasonable proportion of the burden of constructing a highway. It seems reasonably certain from the undisputed evidence, that the assessors and commissioners, some of whom are the land owners to be benefited, are attempting to take from the petitioners a very great amount of property, and to use that property in the construction of a highway, to the end that the lands of the farmers may have a better transportation line than they now have from their farms to their markets. Upon these facts, a grave question is brought before this court.

The undisputed evidence shows that such elements of benefit as those above referred to were not considered in any degree in making the assessments against other

property. The other property was assessed at a fixed sum per acre, regardless of any use thereof. The result is that the petitioners' property is assessed with a view to its use; whereas all other property is assessed by the acre, and at a fixed sum per acre, and at an exceedingly small sum at that. This necessarily results in an unlawful and unjust discrimination against the petitioners, and in an assessment against their property, which is so exorbitant and excessive, as to amount to a burden upon interstate commerce, and a taking of their property without due process of law, and a denial to them of the equal protection of the law. The property of the petitioners is devoted exclusively to railroad purposes, and is used principally in interstate commerce.

The property of the petitioners is a part of a through line of railroad. The right of way of the petitioners is assessed almost exclusively upon its use. It is therefore our contention that the said assessments made under the authority of the Act of the General Assembly of Arkansas, are in violation of the petitioners' rights under the clauses of the Constitution above referred to. We think the principles contended for are sustained by this court in *Martin v. District of Columbia*, 205 U. S. 135. A great disparity between the assessments made against the private land owners and the property of the petitioners is such that it results in a denial of the petitioners' rights, in violation of the Federal Constitution, as heretofore claimed. The Supreme Court of Arkansas, by refusing to set aside said assessments, thus denied to the petitioners, the equal protection of the laws, and deprived them

of their property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and also in violation of their rights under the commerce clause, as heretofore contended. It is therefore believed by counsel for the petitioners, that the action of the assessors and the courts, in confirming the assessors' action, is repugnant to said Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the commerce clause of said Constitution.

It is therefore respectfully submitted that the petition for writ of certiorari should be granted, and that the cause should be reviewed in this court, and the judgment and proceedings of the Supreme Court of the State of Arkansas should be reversed.

Respectfully submitted,

JAMES B. McDONOUGH,
Counsel for Petitioners.

F. H. MOORE,
SAMUEL W. MOORE,
Of Counsel.



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JAMES D. MA

No. 6 205

IN THE
**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1919.

THE KANSAS CITY SOUTHERN RAILWAY COM-
PANY AND THE TEXARKANA & FORT SMITH
RAILWAY COMPANY,
PETITIONERS,

VS

ROAD IMPROVEMENT DISTRICT NO. 6, OF LITTLE
RIVER COUNTY, ARKANSAS,
RESPONDENT.

**RESPONSE OF RESPONDENT TO THE PETITION
FOR WRIT OF CERTIORARI TO THE SUPREME
OF ARKANSAS.**

WILLIAM H. ARNOLD,

Counsel for Respondent.

A. D. DuLANEY,
JOHN J. DuLANEY,
GEO. R. STEEL,
Of Counsel.



INDEX.

	Page
Motion to Deny Application of Petitioners	1
History of the Case	2
Statement of Facts	6
Brief in Support of Respondent's Motion	11

Citations.

American Const. Co. vs. Ry. 148 U. S. 372.....	18
Act 338 of Ark. 1915	2
Battle vs. Atkinson 191 U. S. 559	14
C. R. I. & P. Ry. vs. Road Imp. Dis. 209 S. W. 725.....	24
Ex Parte Vallandigham 1 Wall 243	12
Ex Parte Craine 5 Pet. 190 .. .	12
Forsythe vs. Hammond 166 U. S. 506	18
Fowler vs. Lindsay 3 Doll. 411	13
Harris vs. Barber 129 U. S. 366	14
Hamilton Shoe Co. vs. Wolf 240 U. S. 251	18
Hodges vs. Vaughan 19 Wall 12	13
In Re Tampa R. Co. 168 U. S. 583	15
In Re Huguley Mfg. Co. 184 U. S. 297	15
Jud. Code, Sec. 237	22, 15, 20
Lockwood vs. Bank, 190 U. S. 294	12
Richardson vs. Shaw 209 U. S. 365.....	23
United States vs. Young	12, 13
Whitney vs. Dick	14, 15
Zoline, on Federal Appellate Jurisdiction	16, 19



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MOTION TO DENY.

PETITION OF PETITIONERS FOR WRIT OF
CERTIORARI.

To the Honorable, the Supreme Court of the United
States:

Comes Road Improvement District No. 6, of Little
River County, Arkansas, hereinafter referred to as the
Respondent, and would respectfully oppose the grante
by this Honorable Court of the Writ of Certiorari to the

Supreme Court of Arkansas, which has been applied for by the Petitioners herein; and would respectfully pray this Honorable Court that said petition for said Writ of Certiorari be denied; and for response of respondent to said petition of petitioners, respondent herein would respectfully represent and show to this court a brief statement of facts in this case; and also present a short Brief in support of respondent's motion that a Writ of Certiorari be denied to the petitioners.

A. HISTORY OF THE CASE.

Respondent is a highway improvement district validly organized pursuant to the provisions of a general statute known as the "Alexander Road Law," which is Act No. 338 of Acts of Arkansas, 1915, (p. 1400.) By Section 4 of said Act respondent district became, after the County Court of Little River County, Arkansas, made an order, dated May 14, 1918, establishing said district, a body politic and corporate, as "Road Improvement District No. 6 of Little River County, Arkansas," and "by said name it has a legal status and may sue and be sued, plead and be impleaded, and have perpetual succession for the purpose of building and repairing the roads in said district."

Proper petitions in accordance with Section 1 (A) of said Act 338, praying for the formation of respondent road improvement district were filed in the County Court of Little River County, Arkansas, in February, 1918, (Tr. 1-11); and after the requisite legal publication of notice to all property owners concerned, including petitioners, the County Court, pursuant to Section 1 (B) of said Act 338, fixed a date, namely: May 14, 1918, for hearing the objections of all persons or corporations owning property within the proposed district to the creation of the respondent district, (Tr. 56.) Notwithstanding that petitioners owned 9.7 miles of main line track of their railroad lying within the proposed improvement district, and that sufficient statutory notice had been published, the petitioners and did not appear at final date of hearing on May 14, 1918, and there and then object to the formation of respondent district. On said final hearing date May 14, 1918, the Little River County Court made an order, which by Section 3, of the Act 338, had the force and effect of a conclusive judgment, establishing the respondent district. (Tr. 58-61.)

Petitioners did not appeal, and did not object to the formation of respondent district. Pursuant to the act a

board of commissioners, and a board of assessors were appointed (61; 65). Thhe assessors duly qualified, met in capacity as a board, and assessed benefits on all propretty lying within the district, including petitioners' property, and filed their report with the County Court. (74, 76, 80.)

Subsequently, pursuant to Section 13 of said Act 338, the County Court fixed a (date, namely, August 23, 1918), for hearing all property owners who might desire to have any grievous or wrongful assessment corrected (33). Notice of said hearing was legally published, (34) and for the first time petitioners appeared on August 23, 1918, and raised their voice in objection to the formation of respondent district, objected to the assessment of any benefits against the railroad property, and protested against every step already taken, or to be taken from start to finish (36-42). In said objections petitioners denied the right or power of the County Court of and Board of Assessors to assess against their railroad property. "any assessment of any benefits whatever."

The County Court overruled petitioners objections, and they carried their appeal to the Circuit Court of Little River County where they stood upon the same ob-

jections. (150-155.)

The case came on for trial in the Circuit Court of Little River County on February 19, 1919. The respondent demurred to petitioners objections (144). The Circuit Court sustained said demurrer to paragraphs 1, 2, 3 and 4 (with reservation as to 4) of petitioners' objections (146; 170.) Then the parties went to trial upon the issue of the correctness and fairness of the assessments levied upon petitioners' property, both sides introduced testimony, and the Circuit Court sustained the decision of the County Court as shown by the judgment of the Circuit Court (146). The railroad companies moved for a new trial, which was overruled, whereupon they prayed and was granted an appeal to the Supreme Court of Arkansas.

On July 14, 1919, the Supreme Court of Arkansas affirmed the judgment of the Little River Circuit Court. (321-8) Petitioners applied for a rehearing which was denied on Sept. 29, 1919 (336). On Nov. 5, 1919, Chief Justice McCulloch, of the Supreme Court of Arkansas granted to petitioners a Writ of Error to the United States Supreme Court.

In their application for a Writ of Certiorari peti-

benefits on petitioners' property.

Section 2, of Act 338 does not require the assessors to consider the improvements on land separately as real estate or to make any differentiation of acreage realty in applying thereto any specified method in levying assessments of benefits, deprives petitioners of their pro- words "real property" and "land," and does not contain the word "assessors."

It is true that the assessors adopted the "zone method" in determining the rate of benefits to be levied on the acreage realty, and the mileage or "unit" plan was applied to petitioners property. Zone 1 included a strip of land one mile wide following the route of the highway. Each succeeding zone embraced twin parallel strips of land one-half mile distant from the boundary of the next preceeding zone until Zone No. 5 extended about two and a half miles from the highway. The farm lands were assessed as follows: Zone 1, \$12 per acre; Zone 2, \$10; Zone 3, \$8; Zone 4, \$6; Zone 5, \$5. The assessment was governed chiefly by the proximity of the strip of land to the improved highway. The testimony showed that all the lands were of a similar character and about uniform as to value throughout the district.

Petitioners property was assessed on the mileage or unit basis as required by Section 11 of said Act 338 under which respondent was created.

Counsel for petitioners cites no law or case in which either the "Zone Method" of assessing benefits in local improvement districts, or the mileage or "unit" method in assessing benefits on railroad property has been held illegal or unjust.

Whereupon premises considered, in view of the fact that the Chief Justice of the Supreme Court of Arkansas did on November 5, 1919, grant to petitioners herein a Writ of Error in this cause to this Honorable Court, and that said remedy is the proper one for petitioners to pursue as set forth in Sec. 237 of the Judicial Code of 1911 as amended; and, that by having invoked said remedy petitioners will have this cause appealed to this Honorable Court, and have the alleged errors, if any, of the Supreme Court of Arkansas reviewed by this Court in due time; and, considering further, that petitioners in their said petition for Writ of Error, and assignment of errors set forth the same issues of law and of fact which they set forth in their petition for a Writ of Certiorari in this proceeding, therefore respondents respectfully

contend that this cause will be taken up and heard on its merits when this Honorable Court reaches the call of the case on the Writ of Error, and further that this application for a Writ of Certiorari in this same cause is redundant, and cumulative procedure, is unnecessary, and should not be granted.

Wherefore, respondent prays this Honorable Court to deny petitioners' petition for a Writ of Certiorari to the Supreme Court of Arkansas, in this course: and that the petitioners go hence without day; and your respondent will ever pray.

Respectfully submitted,

Road Improvement District No. 6,

of Little River County, Ark.

WILLIAM H. ARNOLD,

Respondent's Attorney

A. D. DuLANEY,

JOHN J. DuLANEY,

GEO. R. STEEL,

Of Counsel.

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WILLIAM H. ARNOLD,
Counsel for Respondent.

A. D. DuLANEY,
JOHN J. DuLANEY,
GEO. R. STEEL,
Of Counsel.

MOTION TO DENY.

PETITION OF PETITIONERS FOR WRIT OF
CERTIORARI.

**To the Honorable, the Supreme Court of the United
States:**

First. The Supreme Court of the United States de-
rives its authority to issue the Writ of Certiorari from
the constitution and the legislation of Congress.

Originally the Writ of Certiorari was a common
law writ. It is the peculiar and appropriate process for
ordering the entire and complete record or proceeding in

a lower tribunal to be certified for review to a superior tribunal.

Ex parte Crane 5 Pet. 190.

This Honorable Court derives its authority to grant a Writ of Certiorari from the Federal Constitution and the Federal statutes.

Ex parte Vallandigham 1 Wall. 243. . . . Jud. Code Sec. 237, as amended, Act Dec. 23, 1914, C. 2; and Act Sept 6, 1916, C. 448 Section 2. Lockwood vs. Exchange Bank, 190 U. S. 294.

Second. A Writ of Certiorari may be used for two purposes: As an (a) original Writ or (b) an Auxiliary Writ.

When the Writ of Certiorari is used an original Writ it is an appellate proceeding, similar to an appeal or Writ of Error, for the purpose of obtaining a review or re-examination by a superior court of a judgment or some final action of an inferior court upon the merits of the case by which the superior court has before it the whole record of the lower court and is called upon to review both the law and the facts in the case. **United States vs. Young 94 U. S. 258.**

When the Writ of Certiorari is used as an auxiliary

process its purpose is to enable a court to obtain additional information in respect of some matter already before it for adjudication.

"It is sometimes used as auxiliary process, where, for instance, diminution of the record, on a Writ of Error." **Fowler vs. Lindsay 3 Dall. 411. See also Hodges vs. Vaughan 19 Wall. 12.**

It has often been held that it is as an ancillary process only that the writ is employed in this court. **United State vs. Young 94 U. S. 258.**

Respondent respectfully submits that, in view of the fact that petitioners herein were, on November 5, 1919, granted a Writ of Error by the Chief Justice of the Supreme Court of Arkansas in this same cause to this Honorable Court, said Writ of Error is the only necessary and proper procedure in this cause; and that if a Writ of Certiorari is employed in this case it should be used later when the case is reached in due time on the Writ of Error, then said Writ of Certiorari, as auxiliary process, may properly be awarded by this Court, in aid of its appellate jurisdiction, to supply defects in the record, upon allegation by either party of diminution of the record.

Third. The Writ of Certiorari sought in this case is

in the nature of a Writ of Error and should not be granted.

A Writ of Certiorari, when its object is not to remove a case before trial, or to supply defects in a record, but to bring up after judgment the proceedings of an inferior court of tribunal for review on its merits, is in the nature of a Writ of Error.

Harris vs. Barber 129 U. S. 366; Battle vs. Atkinson 191 U. S. 559.

It may not, however, be resorted to as a method of review instead of a Writ of Error, merely to suit the convenience of parties, but only when the circumstances require a departure from the ordinary remedies. **Whitney vs. Dick 202 U. S. 132.**

Even though Section 237 of the United States Judicial Code as amended by the Acts of December 23, 1914, and September 6, 1916, should be construed by this court as providing that a Writ of Error and a Writ of Certiorari are concurrent or cumulative remedies, petitioners should not be allowed to use both modes of appeal when one mode is amply sufficient to obtain a review of the errors of the Arkansas Supreme Court of which they complain, and to have this court re-examine

this cause on its merits.

Fourth. When any other adequate remedy exists the Writ of Certiorari should be denied.

It may be stated as a general rule that a Writ of Certiorari at least when sought as between private parties, will be refused when there is a plain and equally adequate remedy by Writ of Error or by appeal.

In re Tampa R. Co 168 U. S. 583.

In re Huguley Mfg. Co. 184 U. S. 297.

There must be circumstances imperatively demanding a departure from the ordinary remedy by Writ of Error or appeal before Certiorari should issue. **Whitney vs Dick** 202 U. S. 132.

A learned author, Mr. Zoline in commenting upon the distinction between Writ of Error and Certiorari, as may be changed by the amendment of September 6, 1916, says: "The cardinal difference between the two modes of procedure is this: Where a Federal question was properly raised, in the record a Writ of Error may be sued out in the classes of cases above indicated as a matter of right; whereas Certiorari is a discretionary writ and is allowed only in exceptional and extraordinary cases, mainly to settle questions of law upon which there is a

great conflict of decisions or where the question involved is of great public importance." Zoline, on **"Federal Appellate Jurisdiction and Procedure."** p. 135.

Applying the doctrine announced by this author to the case at bar, respondent respectfully submits that petitioners have been granted a Writ of Error to this court by regular procedure by the Chief Justice of the Arkansas Supreme Court as a matter of right; that are no issues of law or facts involved in this case which make it "exceptional and extraordinary," that it involves the construction of a short improved highway, under the provisions of a general "Good Road Law," known in Arkansas as the Alexander Road Law. **Act 338, Acts of Arkansas, 1915 p. 1400,**) that it is one of thousands of instances in the United States today where good roads are being constructed under local improvement State statutes; that it is a common, ordinary, every day practice and has no "exceptional, or extraordinary" characteristics either as to the law or the facts involved in the case. And further it is clear that there is no great conflict of decision on the issues of law involved. Counsel for petitioners in his petition for Writ of Cereiorari and brief thereon, raises only three points of law, namely,

"that the assessments of benefits on petitioners property (1) deprives them of their property without due process of laws; (2) and denies to them the equal protection of the law; and (3) constitutes an unlawful burden on interstate commerce. As these are all Federal questions and the cardinal rules on each have been repeatedly announced by this court there is not sufficient conflict of decisions of this court on the three Federal questions involved to warrant this court to issue a Writ of Certiorari in this case and have brought up for review the entire proceedings and record of the lower courts which comprise several hundred pages of printed matter.

Again, as indicated above, the question involved is not of great public importance. The only issue is whether or not an assessment of benefits of about \$7,000 per mile by the assessors in respondent district acting under authority of Act 338 (Acts of Arkansas, 1915) upon a general assessed valuation of \$33,000 per mile, and other facts, where petitioners had opportunity and did appear at a hearing and contest the correctness of said assessments of benefits. Said Section 2 merely defines the perty without due process of law in vioation of Section 1, of the 14th Amendment to the Federal Constitution.

There is no special public or national importance involved in the case at bar at all. It is only one of thousands of road improvement district cases which are of local concern, and ninety-five per cent of which are finally settled by the judgments of the courts in the different states in which they arise; and this Honorable Court is never called upon to consider such cases of local interest; and it should be left free to consider causes of greater magnitude considering the crowded condition of its docket and the grave public questions, springing up in the aftermath of the world war, now pending before it for decision.

A Writ of Certiorari is not issued as a matter of right. The issuance of it rests in the discretion of this court. It is granted only in cases of gravity and importance. It is a power sparingly exercised. *American Construction Co. vs. Jacksonville R. R. Co.* 148 U. S. 372; *Forsyth vs. Hammond* 166 U. S. 506; *Hamilton Brown Shoe Co. vs Wolf* 240 U. S. 251.

Fifth. Petitioners have been granted the remedy of Writ of Error. Under Section 237, as amended they may also be entitled, as an alternative, to a Writ of Certiorari, but they are not entitled to Both Writs.

Mr. Zoline in his work on "Federal Appellate Jurisdiction and Procedure" p. 134, says: "A final judgment at law or a decree in equity rendered by the highest court of a State is reviewable in the Supreme Court of the United States pursuant to the Act of September 6, 1916, Chap. 448, Paragraph 2, either by writ of error or Certiorari and never by appeal.

"Under the said Act of September 6, 1916, the aggrieved party has the choice of selecting the mode of review, either by writ of error or Certiorari, but only on the following classes of cases:

"a) Where the **validity** of a treaty or statute of, or an authority exercised under the United States was drawn in question and the decision was in favor of or against their validity; and,

(b) Where the question of the **validity** of a statute of, or an authority exercised under and State on the ground of their being repugnant to the constitution, treaties or laws of the United States was drawn in question and the decision was either for or against their validity."

From the comment of this authority it would appear that petitioners may elect which method of bringing

their cause to this court for review they prefer, but that the writs are not cumulative, but alternative.

Sixth. Proper construction of Section 237, as amended, of the Judicial Code, suggests that petitioners should be confined to the remedy of Writ of Error only, and not entitled to a Writ of Certiorari.

Said amended Section is as follows:

“A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is **against** their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in **favor** of their validity; may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such state court, and may, in its discretion award execution or

remand the same to the court from which it was recovered by the writ.

It shall be competent for the Supreme Court, by Certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is **against** their validity; or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held on authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party under such constitution, treaty, statute, commission or authority."

(Jud. Code Sec. 238, as amended Dec. 23, 1914, C. 2; and September 6, 1916, C. 448 Sec. 2.)

Respondent submits that a reasonable construction of said Section 237, as amended, and as applied to the case at bar leads to the conclusion that the use of a Writ of Error is the only proper proceeding by petitioners. As a matter of right by the second clause of the first paragraph they are entitled to a Writ of Error because—accepting their allegation as true—there has been drawn in question the validity of an authority exercised under a State Statute (Act 338, Arkansas 1915) on the ground of its being repugnant to the Federal Constitution and the decision of the Supreme Court of Arkansas was in favor of its validity (See opinion of Court Tr. 321-8.)

Therefore it is clear that the only proper remedy open to petitioners was invoked when on November 5, 1919, Chief Justice McCulloch granted a Writ of Error to petitioners pursuant to Sec. 299 Revised Statute of the United States.

An examination of the second clause of the second paragraph of said Section 237 as amended, and its application to the facts of this case clearly shows that Cer-

tiorari is not the proper remedy for petitioners to employ. Certiorari is the proper mode where is drawn in question the validity of an authority exercised under the Arkansas Statute (Act 338, 1915) on the ground of its being repugnant to the Federal Constitution and the decision is **against** its validity.

Reference to the opinion of the Arkansas Supreme Court shows that said court decided in **favor** of the validity of the Federal question—if any—involved, and not **against** said validity. It is not intended that these two modes of exercising appellate authority over the highest court of a State, one upon writ of error and the other upon Certiorari shall be concurrent, or co-existent with respect to any case or class of cases, but rather that the former, where it exists at all, shall be exclusive. Such is the ruling of this court with reference to the use of the two modes in reviewing cases carried up from the United States Circuit Court of Appeals.

Richardson vs. Shaw, 209 U. S. 365.

United States vs. Beatty, 232 U. S. 463.

Respondent respectfully submits that since petitioners have been granted a Writ of Error in this case that they should be confined to said remedy and that their

petition for Writ of Cerrtiorari should be denied.

Counsel for respondent do not deem it necessary to present a brief upon the merits of the case.

Counsel for petitioners in his brief (p. 31) states that the case at bar is parallel to the case of **C. R. I. & P. Ry. Co. vs. Road Improvement Dis. No. 1 of Prairie County, Arkansas**, and that this court recently granted a Writ of Certiorari to the Railway Company in said case.

Counsels for respondent are advised by the Chief Counsel for the Rock Island Railroad Company that this court passed the consideration of the petition for Cerrtiorari in said cause until the case is taken up for consideration on the Writ of Error which had been previously granted. If such be the record in that cause we presume that the same course will be pursued in this case.

Respectfully submitted,

WILLIAM H. ARNOLD,

Counsel for Respondent

A. D. DuLANEY,

JOHN J. DULANEY,

GEO. R. STEEL,

Of Counsel.

No. [REDACTED]

205

IN THE
Supreme Court of the United States

OCTOBER TERM, 1919.

THE KANSAS CITY SOUTHERN RAILWAY
COMPANY AND THE TEXARKANA & FORT
SMITH RAILWAY COMPANY, PLAIN-
TIFFS IN ERROR,

VS.

ROAD IMPROVEMENT DISTRICT NUMBER 6
OF LITTLE RIVER COUNTY, ARKANSAS,
DEFENDANT IN ERROR.

**ABSTRACT AND BRIEF OF PLAINTIFF IN
ERROR.**

JAMES B. McDONOUGH,
Counsel for Plaintiffs in Error.

F. H. MOORE,
SAMUEL W. MOORE,
A. F. SMITH,
Of Counsel.

INDEX.

	Page
Assessments for Local Improvements in Arkansas Can be Sustained only When the Benefits Equal the Assessments. The Benefits Represent the Enhancement in Value in the Property, Pro- duced by the Construction of the Improvement.	67
Brief Abstract of the Evidence	27
Brief Legal History of the Case	33
Brief of the Argument	39
Conclusion	81
Errors in the Judgment of the Supreme Court of Arkansas	37
Provisions of the Alexander Law	31
Petitioners' Property is a Right of Way, and There- fore a Mere Easement	76
Questions Involved	35
Ruling in the Earlier Cases	58
Statement of the Case	1
The Conjectural and Possible Increase in Transport- ing Farm Products Resulting from the Possi- ble and Probable Clearing up and Cultivating of Unimproved Lands, as a Matter of Law Does Not Constitute Benefits Within the Mean- ing of the Arkansas Act Under Discussion...	61

INDEX.

	Page
The Plan of Assessment was Arbitrary, Unjust and Confiscatory	71
The Said Assessments, Arbitrary, Unjust and Unreasonable as They are, Constitute an Unlawful Burden on Interstate Commerce	74
The Action of the Assessors, in Including the Improvements on Petitioners' Property, and Including the Personal Property, and Taking Into Consideration all its Intangible Values and its Use in Interstate Commerce, Necessarily, and as a Matter of Law, Assesses Benefits Upon Petitioners' Personal Property.	77
The Questions Involved are Grave and Important. Can a Country Highway of this Kind be Built by Local Assessments Levied Upon a Mere Easement and the Use of the Same by Railroad Company. The Contemplated Highway is a Public Highway Built for the Use of the County and the Public in General	78
Upon the Undisputed Evidence, the Assessment of \$67,900.00 Against the Property of the Plaintiffs in Error is Palpably Arbitrary, Unjust, Unreasonable and Void, and Denies to the Plaintiffs in Error the Equal Protection of the Laws, and Deprives Them of Their Property Without Due Process of Law, Contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States	39

INDEX.

Table of Cases.

	Page
Allegheny City vs. W. P. R. R. Co., 138 Pa., 375; 21 Atl. 763	58, 80
Ahern vs. Board of Improvement, 69 Ark. 68	70
Appeal of Hoffman, 118 Pa. 512	76
Bridgeport vs. N. Y. N. H. & H. R. R. Co., 36 Conn. 255	58
Boston vs. B. & A. R. Co., 170 Mass. 95; 49 N. E. 95	58
Bauman vs. Ross, 167 U. S. 548	60
Board of Imp. Dist. No. 1 of Fayetteville vs. Pol- lard, 98 Ark. 543	68, 69
Brown vs. Young, 69 Iowa, 652	76
Borough of Mt. Pleasant vs. B. & O. Ry., 138 Pa. St. 365	80
Chicago, M. & St. P. vs. Milwaukee, 89 Wis. 506; 62 N. W. 417; 28 L. R. A. 249	58
Cache River Drainage Dist. vs. Ry., 255 Ill. 398	60, 63
City of Kankakee vs. Ill. Central, 263 Ill. 589	60, 63
Cribbs vs. Benedict, 64 Ark. 555	61, 65
C. R. I. & P. Ry. Co. vs. Road Imp. Dist. No. 1, Prairie County, 209 S. W. 725	62
Clayton vs. C. I. & S. R. R., 67 Iowa 238	76
C. M. & St. P. Ry. Co. vs. Phillips, 111 Iowa 377	77
Chatham County vs. Seaboard Air Line, 133 N. C. 216	77
City of Bridgeport vs. N. Y. etc. R. R., 36 Conn. 255	80
Chicago etc. Ry. Co. vs. City of Ottumwa, 112 Iowa 300	80

INDEX.

	Page
City of Boston vs. Boston etc. Ry. Co., 170 Mass. 95	80
D. D. G. H. & M. R. Co. vs. Grand Rapids, 106 Mich. 13, 63 N. W. 1007, 28 L. R. A. 793	58
Detroit etc. R. Co. vs. City of Grand Rapids, 106 Mich. 13	80
Erie vs. Piece of Land, 175 Pa. 523; 34 Atl. 808	58
Fire R. Co. vs. Paterson, 72 N. J. L., 83, 59 Atl. 1031	58
Ft. S. L. & Tr. Co. vs. McDonough, 119 Ark. 254	68
Gast Realty & Imp. Co. vs. Schneider Granite Co., 240 U. S. 55	49, 50, 74
Gregg vs. Board of Imp. of Russellville W. W., 84 Ark., 390	71
Hancock vs. City of Muskogee, 249 U. S. 269	50
Houck vs. Little River Drainage Dist., 239 U. S. 254, 265, 60 L. Ed. 266, 274, 36 Sup. Ct. Rep. 58	49, 50
Herden & Ft. S. Ry. Co. vs. Vaught, 97 Ark. 234	76
Improvement Dist. No. 1 vs. St. L. S. W. Ry. Co., 99 Ark. 508	70
Junction R. Co. vs. Philadelphia, 88 Pa. 424	58, 80
Jones vs. Pine Bluff, 49 Ark. 202	71
Kirst vs. Street Imp. Dist., 86 Ark. 1	66, 68, 72
K. C. P. & G. Ry. Co. vs. Water Works Imp. Dist. 68 Ark. 376	68, 70
Kauffman vs. St. Francis Drainage Dist., 83 Ark. 54	69
Lehigh Valley R. vs. Jersey City, 81 N. J. L. 290; 80 Atl. 228	58

INDEX.

	Page
L. & N. R. Co. vs. Barber Asphalt Co., 197 U. S. 430	58, 63
Lidgerding vs. Zignego, 77 Minn. 421; 6 Am. & Eng. Enc. of L. p. 531	76
Myles Salt Co. vs. Iberia & St. M. Drainage Dist., 239 U. S. 478; 485; 60 L. Ed. 392, 396, L. R. A: 1918E, 190, 36 Sup. Ct. Rep. 204	50, 51
Mangles vs. Hudson County, 55 N. J. L. 88	60
Minn. Rate Case, 230 U. S. 352	61
Moore vs. Board of Directors, 98 Ark. 113	69
Matter of Town of Gates, 8 N. Y. S. 247	80
Martin vs. District of Columbia, 205 U. S. 135	82
Naugatuck R. Co. vs. Waterbury, 78 Conn. 193; 61 Atl. 474	58
N. Y. N. H. & H. R. vs. Village of Chester, 134 N. Y. S. 883	60, 63
N. J. etc. Ry. Co. vs. City of Elizabeth, 37 N. J. L. 330	80
Oates vs. Cypress Creek Drainage Dist., 135 Ark. 149	61
Phillip Wagner vs. Leser, 239 U. S. 207, 220, 60 L. Ed. 230, 237, 36 Sup. Ct. Rep. 66	50
Philadelphia vs. P. W. & B. R. Co., 33 Pa. 41	58
Peay vs. L. R., 32 Ark. 31	71
Philadelphia vs. Philadelphia etc. R. Co., 33 Pa. St. 43	80
Rector vs. Board of Imp., 50 Ark. 116	67, 68
Road Imp. Dist. No. 1 vs. Glover, 86 Ark. 231	70
St. Louis, Southwestern Ry. vs. Commissioners of Rd. Imp. Dist. of Lafayette County, 265 Fed. 524	53

INDEX.

	Page
St. L. S. F. Rd. Co. vs. Ft. S. & V. B. Bridge Dist., 113 Ark. 493	61
Sweepston vs. Avery, 118 Ark. 303	68
St. L. S. W. Ry. Co. vs. Red River Levee Dist., 81 Ark. 562	69
Tobie vs. Brown, 20 Kan. 14	60
Union Tank Line vs. Wright, 249 U. S. 275	60, 65, 74

No. 620.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1919.

THE KANSAS CITY SOUTHERN RAILWAY
COMPANY AND THE TEXARKANA & FORT
SMITH RAILWAY COMPANY, PLAIN-
TIFFS IN ERROR,

VS.

ROAD IMPROVEMENT DISTRICT NUMBER 6
OF LITTLE RIVER COUNTY, ARKANSAS,
DEFENDANT IN ERROR.

**ABSTRACT AND BRIEF OF PLAINTIFF IN
ERROR.**

STATEMENT OF THE CASE.

The plaintiffs in error have presented to this court for review by petition for certiorari, and by writ of error to the Supreme Court of the State of Arkansas, the highly important questions of whether the assessment of

"benefits" under a road improvement district law of Arkansas as administered by the Board of Commissioners and courts of that state denied to the plaintiffs in error the equal protection of the law, and also deprive plaintiffs in error of their property in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and also whether said assessments are a burden upon interstate commerce, in violation of Section 8 of Article 1 of the Constitution of the United States. On the petition for certiorari the petitioners in that proceeding, being the plaintiffs in error here, have filed a brief, stating and arguing, but not at length, the questions brought before this court for review. Counsel for plaintiffs in error, in compliance with the rules, deem it appropriate to file this additional abstract and brief on this writ of error.

The plaintiffs in error, The Kansas City Southern Railway Company and the Texarkana & Fort Smith Railway Company, are railroad corporations organized under the laws of the States of Missouri and Texas. The Texarkana & Fort Smith Railway Company, a corporation of Texas, operates that part of the line of railroad which lies in the State of Texas. The Kansas City Southern Railway Company, a Missouri corporation, in connection with the Texarkana & Fort Smith Railway Company, operates a through line of railroad, with branches, from Kansas City, in the State of Missouri, through the States of Missouri, Kansas, Oklahoma, Arkansas, Texas and Louisiana, to the Gulf of Mexico at Port Arthur. By reason of the location of said line of railroad running

through and into so many states, substantially all the business of said corporations is interstate commerce. The said line of railroad runs through the southwestern corner of the State of Arkansas, and through Little River County of said state.

The defendant in error is a road improvement district, organized under what is known as the Alexander Act of Arkansas, being Act 338 of the General Assembly of Arkansas of 1915, and found in the Acts of Arkansas of 1915, pages 1400 to 1444. A map of said road improvement district, showing the same to be in the northern part of Little River County, Arkansas, is shown on page 10 of the transcript herein, with the exception that Section 8 and the west half of Sections 17, 20 and 29, Township 12 South, Range 29 West, were excluded from the territory of this road improvement district. See page 41 of the transcript, showing the court order of the County Court, excluding the land just named.

The map referred to, as well as the maps following page 186 of the record, show the boundaries of said district, the location of the proposed road and the location of the railroad of the plaintiffs in error. The said district begins at the northern boundary of the Town of Ashdown, which is the county seat of Little River County, and extends northward to the northern boundary of said county, which boundary between that county and Sevier County is shown to be Little River. The said district is approximately six and one-half miles north and south at its longest measurement, and about seven and one-half miles east and west at the longest line.

The district happens to be laid out so as to include within its boundaries, the longest possible line of road of the plaintiffs in error. Ashdown, the county seat, is the principal town of the county, and that town is served by two other railroads, to-wit, the St. Louis & San Francisco and the Memphis, Dallas & Gulf, in addition to line of the plaintiffs in error.

As appears from the testimony of Joel Mills and P. S. Kinsworthy, two of the commissioners and large land holders, in the community, one of the purposes of the construction of the road was to get better transportation from the northern part of the district to the thriving town of Ashdown. In laying out the district, however, it happens that all the real property located in the Town of Ashdown is excluded. By referring to the list of property included in the district, and shown on pages 52 to 112, it will be found that none of the property in the district is located in the Town of Ashdown. There is only one town in the district, and that is the small village of Wilton, which appears on the maps, and is near the eastern boundary, but approximately in the center north and south. The road or highway to be built, appears on the maps, and runs from the northern boundary of the Town of Ashdown, nearly north a distance of seven miles to the stream of Little River. About the middle of that north and south road, a branch leads off, which runs three miles to the west, and then one mile to the north. The length of the highway to be constructed and which is not yet constructed, according to the record is 11.2 miles. (See page 186). The record tends to show that the road

will be a gravel road (See pages 48 and 52 of the transcript).

The County Court of Little River County (Tr. 113) found the cost of the improvement, with contingencies, to be \$112,077.74. That was the cost excluding interest on the bonds (See page 113). Therefore, to ascertain the total cost of the road, the interest charges must be added. Joel Mills, one of the Commissioners, testified that the district contemplated issuing \$90,000.00 in bonds (See page 159). The bonds were to bear interest at the rate of six per cent (6%), with a privilege of five and one-half per cent ($5\frac{1}{2}\%$). The meaning of the latter is not shown (159). The court records of the County Court on page 113 recite that the tax, which includes all the costs, including the interest, is to be paid by the real property of the district "in proportion that the amount of the assessed benefits on each tract of land, railroad or tram road or other real property in the district bears to the total amount above set out."

All the commissioners of the district are land owners in said district. P. S. Kinsworthy and Joel Mills, a majority of the board, seem to own a large acreage of land in the northern part of the district. Joel Mills testified that he and his sister owned (Tr. 162) 3500 acres. He further testified that all of that except 80 acres, was within the district. However, by referring to the list of lands on pages 52 to 112 of the transcript, it will be found that Joel Mills owns in the district $563\frac{1}{2}$ acres. Ada Mills, who is supposed to be the sister referred to, owns according to the same record, 833 acres. There is

same acreage in the name of S. S. P. Mills and Mills & Son, but nothing in the record to show that Joel Mills and Ada Mills own any more than that above referred to.

P. S. Kinsworthy, another member of the commissioners (Tr. 182), testified that he owned in all, about 1300 acres. Most of that, however, is in Sevier County, presumably immediately north of this road improvement district. The record on pages 52 to 112, shows that Kinsworthy has in the district 440 acres.

From the testimony of these commissioners, it therefore appears that two of them, together with the sister of Mills, own in and out of the district, 4800 acres. According to the record, the great majority of that land is outside of the district, but evidently in close proximity to the district line. Mr. Mills testified that he and his sister owned 3500 acres within a radius of three miles from Wilton. His sister owned about 1200 acres, and therefore he would own 2300 acres. The record shows that of that amount, only the acreage above named is within the district. It is therefore fair to assume that these two members of the commission, P. S. Kinsworthy and Joel Mills, are owners of large tracts of land lying immediately without the district, but near enough to the district to get some advantage and benefit from the construction of the road. These two property owners apparently were the promoters of the road construction (See pages 2, 3, 4, 5 and 6). Joel Mills and P. S. Kinsworthy, in almost all the petitions, are the leaders in the petitions. On page 5 the petitioners, which includes Kinsworthy, Cooper and

Mills, petitioned the County Court to appoint said Kinsworthy, Mills and Cooper as commissioners, and this the court did (See page 42).

It happened, as stated, that these land owners, who became commissioners, in laying out this district to build eleven miles of road, so placed it in the northern part of the county, as to include 9.7 miles of the right of way of the plaintiffs in error. Against that 9.7 miles, the assessors, endorsed by the commissioners, are endeavoring to fix a tax at the sum of \$7,000.00 per mile, making a total tax against the property of the plaintiffs in error in that small district amounting to \$67,900.00, a sum which seems reasonably sufficient to construct a gravel road eleven miles in length. According to the testimony of Joel Mills (158), A. N. Wood (172), C. E. May (179), P. S. Kinsworthy (182), and L. G. Ferrell (169), the main purpose of the road is to get transportation from the rich lands in the northern part of Little River County to the county seat, Ashdown, which is the principal town in the county. Each of these witnesses that discussed the matter at all, admitted that these transportation facilities would greatly benefit the business of Ashdown. Notwithstanding that, there is no assessment against any of the real property in Ashdown, nor is there any assessment against the St. Louis & San Francisco Railroad, which has a main line through Ashdown; nor is there any assessment against the property of the Memphis, Dallas & Gulf, whose main line comes to Ashdown. There is assessed against the St. Louis & San Francisco Railroad Company one small tract of ground, but no right of

way. See page 64, where the land is described, and the assessment against that acreage is \$348.00. It contains 29 acres.

The Kansas City Southern Railway Company, one of the plaintiffs in error, is shown to own a number of lots in the Town of Wilton. These are separately assessed, as is shown on page 85 of the transcript. See, also, page 83, where other lots are assessed to The Kansas City Southern Railway Company. This appeal does not involve the assessment on those tracts or lots of ground. As appears on pages 52 to 112, the assessors did not in any manner assess the improvements on land. All land, including the lots in the village of Wilton, are assessed solely a flat benefit per acre or a certain arbitrary sum. On the pages referred to, the description of the land is given, the area of the land, and the zone in which it is found, and also the value for general taxes, and then the benefit per acre, and then the total benefit for the entire tract. By following those pages throughout, it will be observed at once, that no assessment is made upon the improvements on the land. For the zones, see Exhibit "I," following page 186. While the track of the plaintiffs in error was not assessed, according to zones, it happens that most of it is in zone 1, which takes the highest acreage assessment, of \$12.00. However, the right of way of the plaintiffs in error was not assessed upon the zone basis. On page 163 Joel Mills testifies in substance that the land was valued in zones. Benefits were assessed according to the zone the property was in. From 50 per cent to 60 per cent (163) of the land is in

cultivation. Mills estimates the value of the improved land at \$30.00 per acre, and the unimproved land at \$5.00 per acre. In his opinion (164) the construction of the improvement added 50 per cent, or would add 50 per cent to the value of the land. It is true that on page 163 he says, "*If you didn't go in and put other improvements on the land besides building the road, it would not be worth anything more.*"

Mr. Mills (166) has a stock of merchandise at Wilton, which ranges from \$9,000.00 to \$20,000.00 in value, and he does business of \$100,000.00 yearly. He states on page 169 that the lands were assessed benefits at \$12.00 per acre in zone 1; \$10.00 in zone 2; \$8.00 in zone 3; \$6.00 in zone 4 and \$4.00 in zone 5. The right of way of the plaintiffs in error (169) was not assessed on the acreage basis.

L. G. Ferrell (169), a citizen of Sevier County, admits on page 171, that the \$7,000.00 assessment is "a little high." He says the assessment "might be a little higher than I would have placed it, if I had been on the assessment board, but not much."

A. N. Wood, one of the assessors, testified that the assessors had a plat such as Exhibit "I" following page 186, before them at the time they assessed the tax. He states (174) that the lands in the district are all about the same character, the only difference is that some are improved, and some unimproved. This witness was unable to give the average assessment (175) for county and state purposes on the lands in zone 1, or any other zone. He testified that the assessors had before them the as-

assessment against the lands for county and state purposes. They had that before them in figures. The assessment book was laid before him, and he was asked to refresh his memory as to the method by which he assessed the lands in proportion to how they were assessed on the tax book. With the book before him, and referring to it, he then testified that in zone 1 he assessed the tax or benefits at \$12.00 per acre. He then took up a tract of land which is shown on page 70, of the record, and also referred to on page 178, described the tract of land, and showed that the valuation for state and county purposes was \$320.00. The assessment against it was \$800.00. That tends to show, and does show, that while the assessors had before them the valuation for the assessment of state and county taxes generally, *they paid no attention to value in making the assessments.* This witness then, on the same page (178), describes two other tracts, which are found on pages 72 and 73, and then testified that "It will run practically the same for zones 4 and 5." This evidence confirms and shows beyond controversy that in the assessment of benefits on the lands, no attention whatever was given to the improvements on the lands. This is also shown by the testimony of C. E. May, another one of the assessors (See page 179 of the Transcript). On page 180 he was asked how he arrived at the assessment of benefits against the land and the railroad property in District No. 6. He said: "The land nearest to the road we assessed the highest, and the land farther from the road smaller." He was then asked why, and the question put into his mouth the answer: "By

reason of the distance one has to travel to get to the road?" He answered yes.

An entirely different rule and method was pursued in making the assessment against the right of way and roadbed of the plaintiffs in error. The evidence shows that the acreage of the right of way of the plaintiffs in error in the district amounts to 130 acres (see pages 130 and 149). On the latter page Mr. Leckie, who had made an exact estimate, stated that the area of the right of way was 130 acres. He figures the total acreage in the district, excluding a right of way, 23,585 acres. However, on the district's map, being the zone map, which is Exhibit "I" following page 186, the acreage in each zone is shown, and the total of that acreage amounts to 24,980 acres. Therefore, for the purpose of the case, it is reasonable to take the acreage in round numbers at 25,000 acres. The amount can be easily calculated. The acreage of the district is shown on all the maps, and each square mile has 640 acres. There is a little variation in the outline of the district. Including all, which is apparently including the right of way, amounts to a little more than 28,000 acres. By reason of a difference in the estimates of the various witnesses, it is fair to take as stated, in round numbers 25000 acres as composing the district. Instead of assessing the right of way amounting to 130 acres upon the acreage basis of \$12.00 per acre, the assessors, the commissioners and the courts assessed said right of way upon its value and included in that value its use as railroad property its intangible value, personal property inhering in that use and value and

every improvement which was upon the right of way. The right of way of the plaintiffs in error, as is shown on page 142, was assessed at \$27,000.00 per mile. The total valuation therefore of the right of way for state and general purposes, within said road district amounted to \$270,220.00 (see pages 110 and 142). The assessors and the commissioners arbitrarily took a value of \$7000.00 per mile. As to how these assessors arrived at that can best be determined by briefly examining their evidence on the subject. Two of the assessors and two of the commissioners were introduced as witnesses. It is deemed proper to call the court's attention to the evidence of these witnesses, in the order in which they appeared in the record, meaning the evidence relating to their method of assessing the property of the plaintiffs in error. On page 159, Joel Mills, a commissioner and land owner, said:

"A. Well, the way we got our information along these lines, is judging by other districts and other communities and estimating the benefits that have accrued to other districts by reason of good roads, and my observation has been that benefits accruing to a district like this, would get just as much good or benefit in five years, as it ordinarily would in 25, without this road improvement or means of transportation.

"Q. What territory, if any, will be opened up to points on the Kansas City Southern by reason of this road being constructed?

"A. First, which I think is the least, is the connection with Road District No. 1 here at Ashdown. The next is the road leading out from Wilton to, or connects with the adjoining county, where there is a lot of valuable territory, which until we built

the steel bridge seven years ago, was virtually annihilated for many months in the year on account of being impossible for them to travel through the bottoms of Little River."

This witness further explained that in his opinion the construction of this road up to the boundary of Sevier County, would bring travel toward Ashdown. By reason of the steel bridge, which was not a part of this improvement, and the construction of this highway, he felt sure that the trade would come from Sevier County. The most of that trade would be drawn from other stations of the plaintiffs in error, north of Wilton and Ashdown. He further said that the principal part of the people in that territory, even now, traded at Ashdown and Wilton. He further testified that *"This improvement practically puts every piece of land in the territory in cultivation; puts settlers on it and puts the land to producing something."* He was then asked: *"By reason of getting transportation facilities to market? A. Yes, sir, and bringing new people into the country to develop the land."* By reason of that, it was his opinion that the Kansas City Southern Railway Company would be benefited.

This same witness testifies on page 160, that some of the farm land and timbered land has no certain facilities for getting anywhere, *except to Wilton*. The court will remember that Wilton is in the district. It appears on the maps. He then said that *if the people in Sevier County could get to the steel bridge, they could then travel over the proposed road to Wilton and Ashdown*

On page 161 the witness states that there are some farms being opened upon the Sevier County side of Red River north of this proposed improvement district. He then says that the land in the northern part of the district is productive, being bottom land on both sides of the river. Some of it is in cultivation, and some of it not (162). Taking the whole district (162) fifty per cent or probably sixty per cent is in cultivation. According to him, the benefit arises by reason of the other people coming in and by bringing money, and people coming in and buying land and putting the land into cultivation (164). The evidence of this witness also shows that in his opinion the construction of this road may attract some trade from the country northeast of the district, and thus bring some trade from other towns, his evidence not being very definite on that subject. His thought is also that trade may be brought from Arden, which is on the Frisco road, twelve or fifteen miles west of the district, and trade may also be drawn from Fulton, which is on the Missouri Pacific Railroad twelve or fifteen miles to the east. After stating that all lands would be enhanced fifty per cent, he said on page 166, that fifty per cent would be a reasonable enhancement in five years, and that the land would enhance in five years with the improvement as much as it would in twenty-five years without the improvement. In his opinion these improved conditions would continue to increase during the life of the district. In answer to the court's question, he states on page 167, that the territory might be extended to the northeast as far as Ben Lomond. The evidence is very

indefinite as to the extent to which the trade might be drawn from the Memphis, Dallas & Gulf, or the Missouri Pacific. He further stated on page 167, that there was a proposed district to be formed in Sevier County, to construct a road to connect with the present road to the north. Of course that district would necessarily include the property of the plaintiffs in error, as does the district south of Ashdown.

Then on page 168, the witness states that the proposed highway is to be a part of a general north and south highway through that part of the state. It is proposed, he says, to make it a general highway in proportion to the benefits which will be received. He was then asked, as appears on page 168, as to what assessment of benefits was made per acre against any of the real estate. Objection was made to that. The objection was overruled, but the witness did not squarely answer the question. When pressed, he simply testified (Tr. 169) to the amount per acre that was assessed in each zone, and closed his evidence by saying that the property of the plaintiffs in error was not assessed on an acreage basis. He claimed that the property of the plaintiff in error was not in any zone at all, but Exhibit "I" shows that the witness is mistaken on that, as the right of way is shown to be almost altogether in zone 1, which takes the highest assessment.

The next witness, L. G. Ferrell, was a citizen of Sevier County, and according to his testimony, had had some experience in assessing benefits in his county.

On page 171, this witness was asked his opinion as to whether the assessment against the plaintiffs in error was an equitable assessment. His answer is as follows:

"If there was nothing to consider except District No. 6 I believe that would be a little high, but taking into consideration the fact that it connects at Ashdown with District No. 1, which is already improved, and which extends a distance of some twenty-five miles or so; and that it branches out and goes into a territory, from which the farming products, or a large majority of which, have been taken into a county east, and which in all probability will be diverted and come to the Kansas City Southern, I do not believe it is very much out of line; might be a little higher than I would have placed it if I had been on the assessment board, but not much."

On cross examination he stated that he had in mind that this proposed highway would make *tributary to Ashdown* the property of which does not pay a cent of tax about 50,000 acres. It was on that assumption that he based his opinion. We have previously shown that 25,000 acres to 28,000 acres are actually in the district. This evidence tends to show therefore, that the Town of Ashdown, which pays no part of the cost of this improvement, will have brought to its doors the trade from an additional 50,000 acres of farm land, whence their products may be shipped on railroads that are competitors of plaintiffs in error.

The next witness was A. N. Wood, one of the assessors (172). He estimated that the lands in District No. 1 which lies south of the present district, and extends

from Ashdown south, had increased in value fifty per cent to one hundred per cent. He does not clearly show that that increase in value was due solely to the construction of the road. This evidence was given on February 19, 1919. Therefore, at that time the lands in controversy, as well as those in District No. 21, had received the enormous increase in price between the years 1914 and 1920. This witness, being one of the assessors, gives substantially the same testimony as the other, and that is, that in assessing the lands, they took into consideration the *zone* in which the land was situated. He further said that the only difference in the lands was that some were improved and some unimproved. Notwithstanding that, they assessed exactly the same figure on the unimproved lands that they assessed on the improved lands. This is conclusively shown by the actual assessments which are found in the record at pages 52 to 112. He was then asked about the assessment against the property of the plaintiffs in error, at the figure at \$67,900.00 and requested to state what he took into consideration in arriving at that figure. He said: "I took into consideration the mileage, and then we assessed it at \$7000.00 per mile." *He does not limit that mileage to that which is in the district.* He does not limit it to Little River County. He does not limit it to the State of Arkansas. The record shows that the line of railroad runs from Kansas City to the Sea, at Port Arthur. It is respectfully submitted that in taking into consideration the mileage, he meant the entire mileage, and therefore he took into consideration in fixing this remarkable sum of

\$7,000.00 the entire mileage of the road. He was then asked to state his opinion of the benefits which would enure to the railroad by reason of this highway. He said:

"This improvement will settle up the country and will cause more products to be raised and shipped out, and more to be shipped in; and also, it will open up territory that can only come to this railroad, and which at certain seasons of the year cannot now get here. You take north of Wilton, for instance, three miles to Littel River and there you strike the Sevier County line, which is crossed by a couple of creeks which are pretty bad to cross, and the bottom, in the winter time, gets mighty bad, and there is a good farming country in north there and east of the river, lying in and around Ben Lomond and Brownstown, which is an inland town, and this road will help to draw trade from that territory to Wilton, and Ashdown."

On page 174 this witness attempts to show that the building of the road three miles westward from Wilton will bring business from Arden, which is on the St. Louis & San Francisco, some twelve miles distant. Neither he nor any other witness attempts to explain what benefits would come to the St. Louis & San Francisco at Arden or Foreman or the Missouri Pacific at Fulton, by reason of the drawing of trade from those places to Ashdown. According to the record, Foreman is west on the main line of the St. Louis & San Francisco through that county. Arden is east of Foreman. These witnesses do not explain how the farmers living around Arden would transport their products over dirt roads twelve miles, in order to reach the northwest end

of this proposed highway, in order to get the farm products down to Ashdown, where they would likewise get the Frisco Railroad.

The important point, however, in this witness' testimony appears on page 175. He states that the assessors had before them the valuation of the land and the railroad property for county and state purposes. "In a sense," and what sense is not shown, the assessors took into consideration that valuation. "But we did not assess the benefits as high in proportion on the railroad, as we did on the lands, because we really thought more benefit would go to the land." This does not show that the lands were assessed upon a valuation basis. It does not controvert the specific record of the assessments found on pages 52 to 112. He then stated that the assessment of \$7000.00 per mile against the property of the plaintiffs in error was "an equitable assessment according to the benefits they will receive." He was then asked by the court to state the average assessment for county and state purposes, but was unable to state it. At no place in the evidence of this witness does he state that the improvements on the farm lands or town lots were considered in the least. He gives it as his opinion on page 177, that the railroad property will be benefited because of the increase in business of the plaintiffs in error, as common carriers. This witness then refers to specific items of property, which has been mentioned above, and which evidence is found on page 178, which shows conclusively, taken in connection with the assessment itself, that the improvements on the farm lands and

town lots are in no manner assessed, the assessment being wholly upon the acreage basis, or at a certain figure per lot.

The next witness was C. E. May, one of the assessors. His testimony is found on pages 179 to 182, and does not vary substantially from that of the preceding assessors.

The next witness was P. S. Kinsworthy, one of the commissioners, and his evidence confirms that of the other witnesses.

Before passing from this subject, we wish to call the court's attention to the actual assessment, and some features of it, which appears on pages 52 to 112. This demonstrates beyond controversy that none of the improvements on the farm lands were in any manner considered. However, before calling attention to that evidence, we wish to call the court's attention to the provision of the statute making it obligatory upon the assessors and the commissioners and the courts to assess the improvements on the lands.

In Section 2 of Act 338 (Acts of 1915 p. 1405), the Legislature of Arkansas expressly required the improvements on real estate to be assessed. Section 1 of the act (p. 1403) authorizes a majority in land value, acreage or number of land owners to file a petition. Section 10 (p. 1410) of the act requires the assessors to assess the benefits to be received by each land owner. Section 11 requires the assessors to assess the benefits against the lands and other real property, including railroads as well. The words real property and land are used

throughout the act. Section 14 gives the County Court power to adjudge the sums a lien against all real property, which has the force and effect of a judgment "against all real property in the district." Any owner of real property is then given a right of appeal. In order that there might be no misunderstanding about the meaning of "real property and land" and for the purpose of showing that the improvements on real property and land must be assessed, the legislature defined these words. Quoting from Section 2 on page 1405, the following appears in the act:

"The words 'real property,' or 'land,' wherever used in this act, shall include land, improvements thereon, railroads, railroad right of way and improvements thereon, including public buildings, sidetracks, etc., and tramroads."

Notwithstanding it is thus made absolutely imperative on the assessors and the courts of the state to include the improvements on real estate, as a part of the real estate, that requirement is wholly, completely and absolutely disregarded by the assessors and the courts. As a matter of general law, without that enactment, including the improvements on real estate, said improvements are a part of the realty and are subject to assessments, as such.

Buildings and improvements are a part of the "land."

Rouse v. Catskill & N. Y. Steamboat Co., 13 N. Y. 126.

Kirst v. Street Imp. Dis. No. 120, 86 Ark. 1.

Lightfoot v. Grove, 52 Tenn. 473.

Mott v. Palmer, 1 N. Y. 569.

Union Central Life Ins. Co. v. Tillery, 152 Mo. 421.

Let us now call the court's attention for a moment to the record of these assessments, for the purpose of showing that the farm lands and town lots were assessed regardless of value and the improvements thereon, and that the railroad property was assessed upon a basis entirely different.

Turning to page 53, we have one of the commissioner's lands, being a tract of 120 acres, valued for taxation for state and general purposes at \$440.00 which is one-half its value assessed at \$6.00 an acre. Throughout that page the assessment is made at a certain fixed price per acre, regardless of the value of the land. The highest valuation of land on that page is \$440.00. That seems to be farm land, and yet there is no indication that there is any house on that land. At least, there must be a house or houses on some of the farm lands. These houses, however, are not considered in the assessment, at all. The values are entirely too low to include any houses. By turning to page 54, it will be seen that the highest valuation is on 160 acres, which is valued at \$4.00 an acre. That certainly does not include the improvements on the land, whether those improvements be in the nature of the clearing and cultivation, fences, houses or whether they be something else. The same is true of every tract of land. By following these valuations through that list, we have no valuation on any of these farm lands sufficient to show that any house or other improvement was considered in assessing the benefits. The values ranged from \$50.00 on some of the 40 acre tracts, to \$400.00. \$400.00 seems to be about the

highest value placed on any of the lands. These continue in that way until we come to the town lots in the town of Wilton. These begin on page 82. On that page we have a lot valued at \$45.00 and \$20.00 assessment of benefits. Immediately following that, we have a lot valued at \$5.00, and a \$20.00 assessment. Following that, was have a lot valued at \$200.00 and a \$20.00 assessment. On page 83 most of the lots are valued at \$5.00, and are followed with a \$15.00 assessment. The same principle runs throughout the assesment. On pages 84, 85, 86, 87, 88, 89, 90, 91, 92, 93 and 94. On the last page appears a lot valued at \$300.00 and an assessment of \$15.00. Following that is a lot valued at \$5.00, and an assessment of \$25.00. *One of the commissioners* is shown to own a fourth of a lot on page 95, which is valued at \$1000.00, which is assessed the magnificent sum of \$15.00. Another lot valued at \$1000.00 belonging to the same commissioner, is assessed at \$15.00. Between those two, is a lot *belonging to another party*, worth only \$75.00 and it has on it an assessment of \$25.00. The same irregularity runs throughout these assessments. The same injustice, inequality and wrong extends down to and including page 110.

It is respectfully submitted that the evidence is undisputed that the assessors, regardless of value, and regardless of improvements, assessed the farm lands in accordance with the zone in which they were located. Notwithstanding that, precisely the same per acre tax is placed on the improved lands as on the unimproved lands. This is referred to simply to show that the as-

assessment on the farm lands, including the commissioners' lands, was made regardless of value. The plaintiff in error, as stated, have 130 acres in the district. Therefore, as against the property of the plaintiffs in error, the assessed benefits exceed \$525.00 per acre. By reference to the map, Exhibit "I," following page 186, it will be observed that this assessment of \$525.00 an acre on the right of way of the plaintiffs in error, beginning at Ashtown, and extending to Wilton, and about three-fourths of a mile beyond Wilton, compares with the adjoining farm lands at \$12.00 per acre, the highest assessment made against farm lands. Beyond that, to the northwestern part of the district, the right of way of the plaintiffs in error is in zone 2, and that right of way is assessed at \$525.00 per acre, as compared with \$10.00 per acre on the farm lands. Beyond that, this same \$525.00 per acre is assessed in Zone 3, where the adjoining lands are assessed at \$8.00, and still beyond that, there is the assessment of \$525.00 an acre against the plaintiffs in error, as compared to \$4.00 per acre on the lands belonging to the commissioners and the other owners.

It is undisputed in this record that the values appearing on the farm lands and town lots on pages 52 to 112 are only 50% of the value of the lands, and that without the improvements, as the improvements are nowhere included. Hence, to get the value of the land, regardless of improvement, each valuation appearing in the record on the pages referred to, would have to be doubled. It may be entirely reasonable to say that the

two assessments against Joel Mills, one of the commissioners, appearing on page 95, amounting each to \$15.00 on land valued at \$1000.00, may include a building. There is no showing, however, that it does include a building. Even if it did include a building, to get the real value, \$2000.00 must be taken. Attention is called to these specific assessments again, because following the \$1000.00 value of Joel Mills, a member of the Board of Commissioners, follows a lot belonging also to Joel Mills valued at \$15.00, against which there is a \$15.00 assessment. Immediately preceding these two fractional lots, valued at \$1000.00, appears fractional lots valued at \$10.00 and against which there is an assessment of \$25.00, and only \$15.00 against the lots valued at \$1000.00. The assessment against the property of the plaintiffs in error is therefore, in excess of sixty-five times the assessment against the property of the commissioners and the other land owners.

If the right of way and property of the plaintiffs in error had been assessed on the same basis as the farm lands, through which said right of way runs, the total assessment against the property of the plaintiffs in error would have been between \$900.00 and \$1100.00, instead of \$67,900.00. There was no evidence to show that the property of the plaintiffs in error was specifically and peculiarly benefited, within the improvement district law of Arkansas. Under the laws of Arkansas, local improvements may be legally made by the organization of local improvement districts only upon the ground that the real property assessed is enhanced in value, in

an amount at least equal to the assessments made against the property (*Rector v. Board of Improvement*, 50 Ark. 116).

It is well settled in Arkansas, that only real property may be assessed with benefits for the construction of local improvements, such as the one in controversy (*Snetzer v. Gregg*, 29 Ark. 542). Notwithstanding that, the assessors necessarily included all the mileage of the plaintiffs in error, in making their assessments, and took an arbitrary figure based upon the value of the improvements on the right of way at \$7000.00 per mile. The market value of the property of the plaintiffs in error decreased in value, instead of rising in value (See page 186 evidence of E. Phelps.).

BRIEF ABSTRACT OF EVIDENCE.

The plaintiffs in error introduced E. Phelps, tax commissioner (129), J. M. Weir, chief engineer having in charge maintenance and way, A. Leckie, division engineer, E. H. Holden, general superintendent having charge of transportation and operation, including the improvement of traffic, J. J. Taylor, superintendent of bridges and buildings and water service, J. J. Hancock, roadmaster, over the right of way in question, all of whom testified in substance that the construction of the highway in controversy would not in any manner benefit the property of the plaintiffs in error, or enhance its value. According to the testimony of E. Phelps, even if there should be any benefit whatever (See Tr. p. 139), that benefit would be only in the proportion that 130 acres bears to 28000 acres. On the subject of benefits, Mr. Phelps makes the following statement, as is shown on page 131:

"Q. Mr. Phelps, I wish you would state whether or not, in your opinion, the property of the Kansas City Southern Railway Company and the Texarkana & Fort Smith Railway Company, located in this road improvement district No. 6, would be in any manner benefited by the construction of this road?

"A. No, sir; I do not think it would be in any manner benefited.

"Q. I wish you would give your reasons for that opinion.

"A. Well, my understanding of the term 'benefit,' means not such a benefit as accrues to property in general, what we might call a community benefit, but a benefit which is special and local or peculiar to the property in question, and in that sense of the word, I do not understand how the railway company could be benefited, for the reason that to receive such a benefit, it would have to be a benefit which would add to the market price and the market value of the railway, and I do not believe that any improvement of the nature contemplated here could constitute an addition to the market value of the property."

Mr. Phelps further testified that this road was used in the interstate commerce, and in his opinion there could be no interstate commerce benefited by this district, as there was only one station within the district. As showing the views of plaintiffs in error witnesses on the subject, we quote the following from the witness last mentioned on page 134:

"I will try to answer the question and try to distinguish between benefits which will accrue to farm and other private property, and benefits which will accrue to railroad property. I do not think anyone who ever thought seriously on the subject, would dispute the proposition that an improved, modern highway will improve and increase the value of real estate and farm lands immediately in the vicinity where the highway is built. Now, the person who owns this property, has it in his power to take advantage of that increase in value; he can avail himself of this benefit or increase in value which accrues to him by reason of the construction of this road. He can take advantage of it in several ways. 1st. If he wants to, he can sell his land, and he can take ad-

vantage of this benefit in the selling price of his land. If he does not want to sell, but wants to rent his land, he no doubt can take advantage of the benefit in that respect, by reason of the increased rental value of the land; or if he does not want to do either, still he can take advantage of benefits arising to him, in the way of a reduction of transportation expense, in the handling of his crops and marketing his products. I can conceive of no way in which the owner of private property can be deprived of the benefit that comes to him by reason of an improvement of that kind. Now when you come to the railroad, it is different. The right of way of the railroad company is not marketable; and not for sale, and the prosperity and earnings of the railroad depend upon conditions extraneous to the property of the people along the line of railroad, to a certain extent. That is, their earnings depend upon rates which are fixed by some other body, besides the body which fixes the so-called benefits by reason of improved highway. Now, if the rates they are operating under does not permit them to operate profitably, all the improvements which could possibly be built in a community could contribute nothing to the value of the railroad."

The defendant in error, introduced the following witnesses: Joel Mills, one of the commissioners (158); L. G. Ferrell, a citizen of an adjoining county (169); A. N. Wood, one of the assessors (172); C. E. May, another assessor (179); P. S. Kinsworthy, one of the commissioners (182). The nature of this testimony has been given rather in detail in the above statement of the case. The general theory of these assessors and commissioners was that the construction of the highway would develop the farms and cause the uncultivated and

unimproved lands within the district to be put in cultivation, and that this probable future cultivation of said lands would result in future in the increase of farm products, and that this increase of farm products would bring additional business to the plaintiffs in error, as common carriers, and this was the ground upon which they based their action in making said assessments. The assessors and commissioners did not attempt to justify the assessment of the property element, and intangible value element in the mileage assessment against the property of the plaintiffs in error; neither did they attempt to justify their failure to assess the improvements on the farm lands, and their action in assessing improvements on the right of way of the plaintiffs in error.

By reason of the above facts which seem to be undisputed, the plaintiffs in error claim that the action of the assessors and the courts, including the Supreme Court of the State of Arkansas, in affirming said assessments, was arbitrary, unjust, unreasonable, confiscatory and void, and said action of said assessors, commissioners and courts denied to the plaintiffs in error the equal protection of the laws, and deprives them of their property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and plaintiffs in error also claim that said assessments so made were a burden upon interstate commerce, contrary to Section 8 of Article 1 of the Constitution of the United States.

Provisions of the Alexander Law.

Sections 1 and 2 (see acts of 1915, pp. 1403 to 1405) provide for the organization of a road improvement district. An original petition accompanied by a map, after the formation of a plan is first filed with the County Court. Notice is given, and the County Court ascertains whether a majority in land value, acreage or in number of land owners, have signed the petition. If they have, and if the best interest of the county and the land owners in said district will be served by the formation of the district, the same may be formed.

Section 3 makes the order of the County Court, establishing the road improvement district, a judgment conclusive, final and binding. The same section gives the right of appeal to any owner of real property.

Section 4 authorizes the County Court to make an order declaring the name of the road improvement district, and declaring that the same shall be a body politic and corporate. At the time of the making of that order, the County Court appoints three commissioners. The commissioners must take the oath of office. The commissioners then organize and report the organization to the County Court. The commissioners must then form a plan and estimate the cost of the improvement (See Section 7). As soon as the commissioners have formulated the plans and ~~ascertained the cost, they re-~~port these matters to the County Court at which time the County Court appoints the assessors (See Sections 9 and 10).

Section 11, which gives the power to assess benefits, is as follows:

"The assessment of benefits shall be made by the assessors in a book bound in permanent form and furnished by the district and at such a time as directed by the Board of Commissioners.

"The assessors shall assess the benefits to be received by the several and particular tracts of land, railroads, tramroads and other real property within the district by reason of the improvement. All lands embraced in said district shall be entered upon said book in convenient subdivisions, as surveyed by the United States, and appearing upon the assessment books in force at the time in said county in appropriate columns, showing: (1) Name of the owner; (2) subdivision of land; (3) number of acres; (4) present assessed value; (5) assessed benefits per acre; (16) assessed benefits to each tract; and, if it be a railroad, or tramroad, the name of the owner thereof, the supposed mileage in said district, the present assessed value of said railroad and other property belonging to said company, and the amount of assessed benefits per mile, and the total amount of the benefits assessed against said railroad or tramroad, and no error in the name of owners, or description of property shall invalidate said assessment, if sufficient description is given to identify same, and any error or mistake in making said assessment may be corrected at the hearing hereinafter provided for."

Section 12 authorizes the assessors to assess damages. The report of the assessors in this case showed that no damages were assessed, although it is undisputed, as will be seen by reference to the maps, that the highway crosses the right of way of the plaintiffs in error in two places. This necessarily causes damage but the

commissioners and the assessors made no assessment therefor. When the assessors complete the work of assessment, they deliver the assessment list to the commissioners. The commissioners then file the same with the county clerk. The county clerk is then required to give public notice by publication of the filing of said assessment list, and the court fixed a date for the hearing. All parties aggrieved by said assessment then have the right under Section 13, to present their objections in writing.

In Section 14, the real property owner has the right to appeal from the County Court to the Circuit Court. From the latter court the right of appeal exists to the Supreme Court of the State.

Under Section 19 of the Act, the County Court is required to make an order at the time that the assessment of benefits is filed by the commissioners, which order shall have all of the force and effect of a judgment, and which order must provide that there shall be assessed upon the real property in the district "a tax sufficient to pay the estimated cost of the improvement with 10 per cent added for unforeseen contingencies, which tax is to be paid by the real property of the district, in proportion to the amount assessed of benefits thereon."

Under the same section, the tax so levied is a lien upon all of the real property in the district, from the time the same is levied by the County Court.

Brief Legal History of the Case.

As is shown by the transcript, the property owners filed a petition with the County Court. The County

Court granted the prayer of the petition, and ordered the necessary notice to be given. The first notice was deemed irregular or insufficient, and a second notice was given. The assessors and the commissioners were finally appointed, and the assessors filed their report, which appears on pages 51 to 112 of the transcript. Upon the filing of that report, the court gave the notice required by the statute, and fixed August 23rd, 1919, as the date for hearing objections to the assessments. The plaintiffs in error herein appeared on that day, and filed their objections (See pages 25 to 29 of the Transcript). Objection No. 2 is in the following words:

"The attempted assessment of benefits under said Act 338 of the General Assembly of the State of Arkansas, is an unreasonable and unlawful burden upon interstate commerce, as the said railroad companies are engaged in interstate commerce, and the assessment of said benefits is an unreasonable burden upon said commerce."

Objections 4 to 8 (Tr. pp. 28-29), inclusive, assert that the property of the plaintiffs in error is not benefited, that the construction of said highway amounted to the construction of a competing line of transportation, and that said assessments as made, discriminate against the petitioners, and that said assessments were unreasonable, arbitrary, unjust and unlawful, and deny to the plaintiffs in error the equal protection of the laws, and deprive them of their property contrary to Section 1 of the 14th Amendment to the Constitution of the United States.

The above objections and questions were preserved by the plaintiffs in error throughout all the proceedings,

including the proceedings in the County Court of Little River County, and on appeal in the Circuit Court of Little River County, and on appeal to the Supreme Court of the State of Arkansas. For the appeal, see pages 30 to 33 of the transcript. For the proceedings in the Circuit Court, see pages 116 to 186. On pages 118 to 125 the proceedings in the Circuit Court show the preservation of the exact questions above set forth. In the Little River Circuit Court, as is shown on page 187, the motion for new trial preserves the same questions. As is shown on pages 195 to 198, the same questions were preserved in the petition for rehearing in the Supreme Court of Arkansas. The Supreme Court of Arkansas denied the contentions of the plaintiffs in error, in the opinion, which appears in the transcript at page 191 and also denied the petition for a rehearing. Thereupon, the plaintiffs in error filed in the said Supreme Court of Arkansas a petition for a writ of error (205), and at the same time an assignment of errors, the latter raising the questions herein stated. The petition for writ of error was granted, and the transcript duly lodged in this court.

Questions Involved.

The assignment of errors, which is found on page 199, of the transcript, brings to this court for review the following important questions:

1. Under Section 1 of the Fourteenth Amendment to the Constitution of the United States, is the respondent justified in assessing against the property of the petitioners in the construction of a highway, eleven miles in

length, a total assessment amounting to \$67,900.00, including in the value of petitioners' property is franchise value, certain of its personal property and its use in interstate commerce, thereby assessing benefits averaging in excess of \$525.00 per acre, and at the same time assessing against the adjoining lands nominal sums ranging from \$4.00 per acre to \$12.00 per acre and at an average of a little more than \$7.00 per acre, especially when the undisputed proof shows that the only claimed possible benefit which can come to petitioners' property is the probable future increase in traffic, resulting from the probable, conjectural and future improvement and cultivation of lands in said district not now in cultivation?

2. Under the facts set forth, have the lower courts denied to the petitioners the equal protection of the laws granted under Section 1 of the Fourteenth Amendment to the Constitution of the United States?

3. Are the assessments made as above indicated, a burden upon interstate commerce?

4. Are said assessments as above indicated, unjust, arbitrary, discriminatory and therefore invalid, depriving the petitioners of their property without due process of law, and denying to them the equal protection of the laws, and denying to them their rights, privileges and immunities granted to them by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. Is the said Alexander Law of Arkansas (Acts 1915, p. 1400), as administered by said assessors, commissioners and courts, repugnant to the said sections of

the Federal Constitution? The Supreme Court of Arkansas by its decision affirmed the action of the said assessors in making said confiscatory assessments thereby denying to the petitioners their rights under said section of the Federal Constitution.

Errors in the Judgment of the Supreme Court of Arkansas.

The decision of the Supreme Court of the State of Arkansas, upon the facts and the record herein is erroneous in the following particulars:

First. The said Supreme Court of Arkansas, in affirming said assessments, erred in not holding that said assessments as made, were repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, inasmuch as said assessments illegally and in violation of said Constitution of the United States, distributes a local tax for the construction of a proposed highway arbitrary and without just cause, and in grossly unequal proportions, thereby levying upon the real property of the petitioners, a tax grossly in excess of that levied upon similar land in the district.

Second. The said Supreme Court of Arkansas, in affirming said assessments erred in failing to hold that said assessments as made denied to the petitioners the equal protection of the laws, as guaranteed to them by Section 1 of the Fourteenth Amendment to the Constitution of the United States. The said assessments distribute the local tax for the construction of said highway arbitrarily and without just cause in grossly unequal

proportions, thereby levying upon the real property of the petitioners a tax grossly in excess of that levied upon similar lands in the district.

Third. Said Supreme Court of Arkansas erred in failing to hold that said assessments so made deprived the petitioners of their property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, the petitioners asserting that said assessments so made did deprive said petitioners of their property without due process of law, contrary to said section of the Constitution in that said assessment arbitrarily lays a local tax upon the property of the petitioners, greatly in excess of the benefits received by said property.

Fourth. Said Supreme Court of Arkansas erred in failing to hold that said assessment so levied violated Section 8 of Article 1 of the Constitution of the United States, said assessments so made being a burden upon interstate commerce, and said assessments imposing a tax upon the increase in the petitioners' revenue accruing from interstate commerce, thereby unlawfully taxing interstate commerce.

Fifth. The said Supreme Court of Arkansas erred in affirming the action of the Circuit Court of Little River County, and in confirming and upholding said assessments.

Sixth. Said Supreme Court of Arkansas erred in not reversing the judgment of the Circuit Court of Little River County.

BRIEF OF THE ARGUMENT.

I.

Upon the undisputed evidence, the assessment of \$67,900.00 against the property of the plaintiffs in error is palpably arbitrary, unjust, unreasonable and void, and denies to the plaintiffs in error the equal protection of the laws, and deprives them of their property without due process of law, contrary to section 1 of the fourteenth amendment to the constitution of the United States.

In view of the extended statement of facts made above under the paragraph entitled "Statement of the Case," it will be deemed necessary to make but little additional statement as to the facts.

The method of assessing the farm lands, compared with the method of assessing the right of way of the plaintiffs in error, shows on its face to be a rank injustice. No matter how great the value of an improvement on the farm, no benefit was assessed by reason of that improvement. In the very teeth of the Alexander Law (Acts of 1915, p. 1405), the assessors, the County Court, the Circuit Court and the Supreme Court of the state, have refused to assess benefits on the improvements on the lands belonging to the commissioners and the other farmers and the town lots within the district. In the most arbitrary manner said assessors and courts have refused to follow the plain language of the law. On these farm lands, and on the town lots, there may exist build-

ings worth thousands of dollars, which buildings are real property, and under the law must be assessed. Yet the assessors and the courts absolutely refuse and have refused to assess these improvements in the slightest degree.

It will not be contended that there are no buildings and improvements on these lands. Half of the lands are in cultivation. Therefore, half of the lands have an added value, by reason of the improvement. It would be unreasonable to say that out of a total area of 28000 acres, being a territory about seven miles north and south, and six and one-half miles east and west, there were no buildings, or other improvements. It will not be contended that there are no farm houses and other valuable improvements on these farm lands. The list of the property found on pages 52 to 112 in the transcript shows a large number of land owners. One of the commissioners shows that he has a mercantile business in the Town of Wilton, where he does a business of \$100,000.00. He therefore has a store. There are other stores at Wilton. A list of the property on pages 52 to 112 shows approximately *five hundred owners*. These five hundred owners necessarily live in farm houses or dwellings. The witnesses for the plaintiffs in error, heretofore named, testified that no benefit would accrue to the railroad property as such, by reason of the construction of this highway. By reason of the highway being a competing line, they were of the opinion that the construction of the highway would be a detriment. They looked upon the assessment of the tax against the property of the plain-

tiffs in error as an exaction from the plaintiffs in error for the purpose of building up a competing line of business. However, it was admitted by Mr. Phelps, the tax commissioner, that the land in the right of way *regarded as acreage*, would receive as land whatever benefit was received by the farm lands lying on either side of the acreage of the right of way (139). However, in presenting to this court the question of law under consideration, we are disregarding the testimony for the time being, of the witnesses of the plaintiffs in error, and are relying upon the testimony of the witnesses of the defendant in error. That evidence has been referred to, but will now be briefly restated, in order to bring before the court the question of law under discussion.

In general terms, witness Joel Mills (159) stated that he regarded the assessment against the property of the plaintiffs in error as a "*fair*" assessment. He was asked what benefits would accrue to railroad property, by reason of the building of the highway. In answer he explained (159) the way in which they obtained their information, which was by observing *other districts*, and *other communities*, and by estimating the benefits that have accrued to *other districts* by reason of good roads. He then said that the benefits to accrue with the road would be as much in five years, as they would be without the road in twenty-five years. He then states that another benefit which he regards as the least to the property of the plaintiffs in error, is that the proposed highway will connect with another highway leading south from Ashdown (160). He then refers to the road leading out

from Wilton to connect with the adjoining county, in which county he says there "is a lot of valuable territory, which until we built the steel bridge seven years ago, was virtually 'annihilated' for many months in the year, on account of being impossible for them to travel through the bottoms of Little River."

The fair inference from that is that much of the land from which trade is expected in the future, lies in Sevier County, and beyond the vicinity of the proposed road.

He then to some extent explains his reference to the valuable territory. He says that territory now has no certain facilities for getting anywhere *except to Wilton*. The proposed highway does not extend into Sevier County, and hence cannot draw upon any territory in Sevier County. According to his statement, the people living in Sevier County already get as far as Wilton. The proposed highway cannot help them in their travels through Sevier County. Hence his reference to the valuable territory in Sevier County is rather imaginary and hazy, to say the least of it. He then gives it as his opinion that the steel bridge across Little River, which has been there seven years, and the construction of this road will bring trade from the south end of Sevier County. That will, in no manner benefit plaintiffs in error, because it will simply bring the products from Sevier County to Little River County instead of transporting those products in farm wagons from the farms where grown to the nearby stations on the line of road of the plaintiffs in error in Sevier County, such as Horatio and

other stations near by. The effect of this testimony is to show that the promoters of the road have in mind the bringing of trade of Sevier County, from the places where it now goes (to Horatio, and other places on the line of road of the plaintiffs in error) to Little River County, to benefit the commissioners and assessors who are merchants and farmers at Wilton and Ashdown. He then states (160) that a great many of those people presumably in Sevier County, already do their trading at Ashdown and Wilton. In fact, he says the principal part of them do their trading at Ashdown and Wilton. Following that, he discusses the territory northwest of Wilton. By referring to the map following page 10, the meaning of the witness is easily understood.

The Town of Arden on the Frisco Railroad is some twelve or fifteen miles west of Wilton. The witness attempts to argue that the building of that road three miles west of Wilton will attract trade from Arden on the Frisco to the town of Wilton. It may fairly be assumed that the town of Arden and the Frisco Railroad Company will also be taxed to build good roads from Arden toward Wilton. This argument therefore, falls of its own weight. They argue that the construction of a road from Wilton west a distance of three miles, and then one mile north, will attract trade for twelve or fifteen miles from the west and take the trade away from Arden on the Frisco Railroad, forgetting that the trade from Arden would not care to go to Wilton and then to Ashdown in order to reach the Frisco Railroad, because they can reach the Frisco Railroad at Arden. It is not a sound argument

to say that the plaintiffs in error will be benefited as against their competitors by building highways at their expense from the villages on their line a few miles in the direction of other railroads, because the same argument would be made by the other communities and against the other railroads, and therefore the argument destroys itself. The commissioners and the assessors, and in fact all of the witnesses of the defendant in error, defended their action in making these exorbitant assessments by the *argument* that this small road would draw trade from Arden on the Frisco, twelve or fifteen miles west, and would also draw trade from Fulton on the Missouri Pacific, twelve or fifteen miles to the east.

It is rather difficult to understand how the small road extending from the prosperous town of Ashdown to Little River on the north, could be such a drawing card in bringing volumes of trade from competing towns to the east and west. It is fair to assume that the community at Fulton may be engaged in building highways too. The same is true of Arden and Foreman, the latter towns both being in Little River County, and on the Frisco and west of Ashdown. If this kind of an argument could be successful as a defense to such exorbitant taxation as applied to the plaintiffs in error in this district, then the communities at Fulton, Arden, Foreman and other towns east, west, north and south could likewise build small roads, and claim that the construction of those roads would draw trade from the vicinity of Wilton and Ashdown. The commissioners at Fulton, Arden and Foreman, being land owners in and around

those towns would take the stand and testify that the construction of these small roads leading out from their communities would attract trade from the rival towns of Wilton, Ashdown and other places. Therefore, the Missouri Pacific Railroad Company at Fulton and the Frisco at the other towns, would be benefited, in the opinion of the commissioners, being large land owners. It is clear, therefore, that this argument has as its foundation, a race between the different communities to draw trade from one to the other at the expense of the railroads. It is easy to understand why these different communities would engage in such active campaigns to build up their lands and business at the expense to other communities. They are willing to make those active campaigns and spend enormous sums of money, because the money does not come out of their pockets. It comes out of the treasuries of the railroads. They are spending other peoples' money. The land owners and business men are willing to build great highways, because they can build them at the expense of the existing common carriers in the community. As a further reason for making these assessments against the plaintiffs in error, it is argued (160) that the construction of these highways puts every piece of land in the territory in cultivation; puts settlers on it, and puts the land to producing something. That result is brought about (160) by giving transportation facilities to market. It is also said that new people are thus brought into the country to develop the land. If that is true in every community whence come the people? The argument, therefore, is that by building good roads

at Wilton, the people living at Arden will move to Wilton, the people living at Arden will move to Wilton. The people living at Fulton will move to Wilton. The people in the mountains will move to Wilton. In the imagination of these witnesses, they see Wilton by reason of the construction of this eleven miles of road, becoming a great commercial metropolis, and the plaintiff in error handling thousands of tons of traffic never before heard of or produced. The situation reminds one of Practor Knott's speech on Duluth. The result of such an argument will be that after the farmers and merchants at Wilton have, by this system of taxation, secured large sums of money to construct highways for their community, other communities will do the same thing, and the result will be that the carriers will be deprived of their property without due process of law, and will be deprived of the equal protection of the laws.

Our purpose in calling attention to this evidence at this time was to show the theory upon which the exorbitant sums are placed against the property of the plaintiffs in error. As showing the unreliability of the theories, because they are nothing but theories upon which the assessments are based, attention is called to the fact that, notwithstanding the witnesses testified that the farm lands would be doubled in value and that fifty per cent of the farm lands were now in cultivation, yet Joel Mills said on page 165, that at the present time there was not much to be brought from these farms to the towns. In this connection also, we desire again to call the court's attention to the evidence of A. N. Wood, one

of the assessors (see pages 172 to 177). On page 174 he was asked what benefits would enure to the railroad. His reply was that it would settle up the country, and would cause more products to be raised and shipped out and more to be shipped in, and it would open up territory that can only come to this railroad. It will be observed that this is precisely the same *argument* made by the other land owners. On page 175 he admits that the assessment against the railroad is based on the development or good will that will come to the country by having better transportation facilities. This witness also thinks that by the construction of the road, which does not extend beyond Little River, they might get an equal divide of the trade in the neighborhood of Ben Lomond and Brownstown, which are in the adjoining counties, the latter being on the Memphis, Dallas & Gulf Railroad, which latter road runs from Nashville, Arkansas, the county seat of Howard County, to Ashdown, the county seat of Little River County. In other words, according to this witness, by building a highway three miles north of Wilton to the river, he will secure the trade to the northeast, which is tributary to the towns on the Memphis, Dallas & Gulf Railroad. Hence, the benefits will be taken from the Memphis, Dallas & Gulf and brought to the Kansas City Southern Railway Company. The reverse side of the picture will be presented when the people at Brownstown begin to construct two or three miles of highway, on their side of the river.

This witness knew nothing of railroad values; had never operated or built a railroad, but by reason of the

probable future increased cultivation of the lands, and for no other reason, he thought the roadbed and right of way of the railroad becomes more valuable, because it had an increase in business (177).

It is unnecessary to dwell upon the evidence of this witness. It is undisputed that they base the assessment of benefits upon the probable conjectural future incidental increase in cultivation of land, and coming in of people into the community, and that from this increase in the cultivation and the production of more farm products, there would be an increase of business sometime in the future to the railroad, and that probable future business of the railroad would be a benefit entitling them to assess a heavy tax against the right of way of the railroad. The wonder is they did not argue the birth rate would be heavily increased by these good roads, and hence there would be more passengers to be carried. Unless the birth rate is increased, how will they get so many new people? In addition to that, it is conceded that they did not assess the railroad upon an acreage basis. They assessed it solely upon a basis of value. They took the value as returned to the county officers by the state tax commission. The total assessed value of the property of plaintiffs in error in the district for general purposes, amounts to \$270,220.00 (see page 110). The mileage, as before stated, is 9.7 miles. The side track is assessed at \$3000.00 a mile, for general state purposes, and the main line at \$33,000.00 per mile. The two average about \$27,000.00. *The acreage of the right of way is not worth any more than the adjoining acreage*

of the farm lands. Hence it is undisputed that in assessing the tax against the plaintiffs in error, the acreage, the sole basis used for farms was wholly disregarded, and the tax was assessed arbitrarily upon a valuation basis. If the acreage is considered, then plaintiffs in error are taxed \$525.00 per acre, while the adjoining farm lands are assessed \$4.00, \$6.00, \$8.00, \$10.00, and \$12.00 per acre.

It is respectfully submitted that these facts, which are undisputed, condemn this assessment as palpable, arbitrary and in violation of the rights of the plaintiffs in error, as guaranteed to them by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

In case of *Gast Realty & Imp. Co. v. Schneider Granite Co.*, 240 U. S. 55, this court, speaking through Mr. Justice Holmes, said:

"But as is implied by *Houck v. Little River Drainage District*, if the law is of such character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other, and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact."

After some further discussion, this court, in upholding the rights of the property owners under the Fourteenth Amendment to the Constitution, as against the assessment of benefits, said:

"The differences were not based upon any consideration of difference in the benefits conferred,

but were established mechanically in obedience to the criteria that the charter directed to be applied. The defendants' case is not an incidental result of a rule that, as a whole and on the average, may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that requires the result."

In another recent case of *Hancock v. City of Muskogee*, 249 U. S. 269, in upholding an assessment, this court said:

"We do not mean to say that if in fact it were made to appear that there was an arbitrary and unwarranted exercise of the legislative power, or some denial of the equal protection of the laws in the method of exercising it, judicial relief would not be accorded to parties aggrieved. The facts of this case raise no such question."

In support of that, the following cases were cited:

See *Phillips Wagner v. Leser*, 239 U. S. 207, 220, 60 L. Ed. 230, 237, 36 Sup. Ct. R. 66; *Houck v. Little River Drainage Dist.*, 239 U. S. 254, 265, 60 L. Ed. 266, 274, 36 Sup. Ct. Rep. 58; *Myles Salt Co. v. Iberia & St. M. Drainage Dist.*, 239 U. S. 478, 485, 60 L. Ed. 392, 396, L. R. A. 1918E, 190, 36 Sup. Ct. Rep. 204; *Gast Realty & Invest. Co. v. Schneider Granite Co.*, 240 U. S. 55, 59, 60 L. Ed. 523, 525, 36 Sup. Ct. Rep. 254.

In the case at bar, the undisputed facts above set forth did raise this specific question. In effect, apart

from the acreage question, it is precisely the same question that was decided in favor of the Salt Company in *Myles Salt Co. v. Iberia & St. L. Drainage*, 239 U. S. 478. In that case, on the subject under consideration, this court, speaking through Mr. Justice McKenna, said:

"Nothing could be more arbitrary if drainage alone be regarded. But there may be other purposes, defendants say, and besides, that the benefit to the property need not be direct or immediate; it may be indirect, such as might accrue by reason of the general benefits derived by the surrounding territory. But such benefit is excluded by the averments, and it certainly cannot be said that the elevated land of Weeks Island could be a receptacle for stagnant water, or would be otherwise a menace to health if not included within the district, or would defeat the purpose of the law, which seems to have been the ground of decision in *George v. Young*, 45 La. Ann. 1232, 14 So. 137.

"The case, therefore, is within the limitation of the power of the state as laid down in *Houck v. Little River Drainage Dist.*, *supra*, which cited *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep., 187. and retains its principle. It has not the features which determine *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. Ed. 879, 21 Sup. Ct. Rep. 625, and the cases which have followed that case, and *Phillip Wagner v. Lester* (239 U. S. 207, *ante* 230, 36 Sup. Ct. Rep. 66), decided coincidentally with *Houck v. Little River Drainage Dist.*, and cited in the latter.

"It is to be remembered that the drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only, that it may pay for the benefit to other property, there

is an abuse of power and an act of confiscation. *Phillip Wagner v. Leser, supra*. We are not dealing with motives alone, but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by consideration not of the improvement of plaintiff's property, but solely of the improvement of the property of others, power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind."

The assessment of the property of plaintiffs in error at \$67,900.00, including the elements of value heretofore named, and on an acreage basis, at \$525.00 per acre, and assessing the farm lands on either side at \$4.00 to \$12.00 per acre, regardless of the improvements, is so lacking of equity, justice and right as to convince one that said assessments are unlawful and attempt to deprive the petitioners of their property in violation of their constitutional rights.

The present case is not controlled by the decision of this court in the case of Branson v. Bush, 251 U. S., 182. In that case there was no palpable, arbitrary, inequality in the assessment on the farm lands and the railroad property. The improvement district in that case was created by an Act of the Legislature. See Private Acts of Arkansas of 1911, page 642. Under Sec. 5 of that Act, the Legislature of Arkansas declared that all real property, including railroads and tramroads, would be benefited by the building of the highway. The benefit was based upon the valuation of all real property, as it appeared upon the county assessment roll. Hence, in that case the

improvements on the farm lands were assessed. All real property, including railroads, was treated exactly alike. There was no discrimination, and no omission of the improvements on the farm lands, and the inclusion of all improvements on the railroad property. In the case at bar, an entirely different question is presented.

In the Branson case it was contended that the railroad property was benefited because the road would bring trade to Alma, where the railroad had no competitor, and take it away from Van Buren, where there was competition. The reverse is the situation in the case at bar. The building of the road in the case at bar, according to the evidence, would bring trade from the towns north of Ashdown, and which towns are tributary to the line of The Kansas City Southern Railway Company, and bring said trade to Ashdown, where there are two competing lines. That was not the situation in the Branson case.

We desire to call the court's attention to a recent case, determined by the Court of Appeals of the Eighth Circuit. We refer to the case of *St. Louis, Southwestern Ry. v. Commissioners of Road Improvement District of Lafayette County*, 265 Fed. 524. This court will take judicial knowledge of the location of LaFayette County, Arkansas. It lies about eighteen miles east of Texarkana. The improvement district includes the towns of Louisville and Stamps, and said district is some thirty or forty miles from the district under consideration. The northern part of LaFayette County is a little less than six miles south of the southern part of Little River County. *The two road improvement districts are there-*

fore in the same neighborhood. As will be seen by referring to the LaFayette County case cited above, the assessors and commissioners divided the district into zones. The farm lands in these zones were assessed at \$2.00 per acre, and probably up as high as \$6.00 per acre. The most of it was assessed at \$2.00 and \$4.00 per acre. The railroad was assessed at \$1000.00 per mile. The district contained about 70,000 acres. The railroad right of way contained 231 acres. *The railroad contended, as we do here, that if there was any benefit at all, the right of way could be assessed only upon the acreage basis, being the same basis that all other lands were assessed. The court below assessed the railway on that basis, AND AT \$54.00 PER MILE, INSTEAD OF \$1000.00 PER MILE.* In the towns, however, the court increased that assessment to \$2400.00 per mile. The railroad had been assessed at \$49,600.00, and the decision of the court reduced the assessment to \$10,485.48. The Court of Appeals affirmed the decision. If the assessment in that case had been made as it is in the case at bar, at \$7000.00 a mile, the assessment against the railroad in that case would have amounted to \$348,400.00. In that case, there were several important towns and valuable real estate in the towns. *In the present case, that is not the fact.* Therefore, that case is authority for holding that the only assessment that could be made, would be as contended for elsewhere in this brief. In other words, the assessment should not exceed \$100.00 per mile. That decision was affirmed by the Court of Appeals. AND THAT ASSESSMENT STANDS TODAY AT \$54.-

00 PER MILE. *As against that, we have in the case at bar, an assessment of \$7000.00 per mile. The very statement of the matter brings the present case within the condemnation of this court in Citizens S. & N. Co. v. Topeka, 87 U. S. 655, as follows:*

To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

It is a matter of common knowledge, and I think a matter of which the court will take judicial knowledge, that the State of Arkansas proposes to spend something like \$100,000,000.00 in the construction of highways. If the railroads of Arkansas are to be assessed at \$7000.00 a mile in one community, and \$54.00 a mile in another community only 30 miles away the sense of justice of every person will be shocked. If they are to be assessed \$7000.00 a mile throughout the entire state, then every right thinking person will be shocked at such an outrage.

The plaintiffs in error utterly failed to get any relief before the assessors, the commissioners or the courts in Arkansas. The Constitution of the United States was made for the purpose of protecting the life, liberty and property of the entire people in the United States. This is certainly a case deserving protection. We do not controvert the right of the assessors and the courts to class-

ify property within the district, so long as the classification is made upon the basis of benefits received. The scheme of classification, however, may itself be so wrongful and irrational, that it cannot be sustained. Such was the decision of this court in the Gast Realty Company case, heretofore cited.

In addition to the above suggestions, we wish to call the court's attention to the fact that it is not entirely reasonable to assess benefits upon a right of way, including therein the use of said right of way. It is well known that rights of way may be abandoned. The plaintiffs in error, in reducing curves and grades, and in the improvement of their line in 1907, did abandon or attempt to abandon parts of the line. A new line was built in Sevier County. It was built in order to have a better railroad. The new line left out the town of Horatio. The Legislature of Arkansas passed an Act prohibiting the plaintiffs in error from abandoning the old line. See Private Acts of Arkansas, 1911, p. 342. In 1918 an entire line in Arkansas was abandoned and junked. This was the Kansas City & Memphis Railway Company, a line in northwestern Arkansas about fifty-five miles in length. See the case of *Mississippi Valley Trust Co. v. Southern Trust Co.*, 261 Fed. Rep. 765. This court will take judicial knowledge of the fact that railroads are often abandoned. What would become of the assessment in the case of abandonment? We submit that it is not good morals, good law, or justice, either to the railroads or to the buyers of the bonds of the district, to

permit heavy assessments against railroads on the theory that the railroad will be certain to pay its assessments, and therefore the bond holder will be certain to have his money repaid to him. These are mere incidental suggestions, and are not controlling, but do have a bearing upon the decision of the main question.

Whenever the benefit to property, which accrued by the construction of an improvement, is so based that it changes and becomes greater or less, whenever the use to which the property is put changes, it is evident that the benefit is not assessed against the enhancement in value of the property itself, but that it is assessed against the enhancement in value of the business conducted upon the property. In other words, to assess benefits against property because of the increase in the business to be done upon it, is nothing more or less than exacting an excess profits tax upon the gross income of the land owner. In determining whether the facts in this case warrant the conclusion that the rights of the plaintiffs in error are denied contrary to the constitution of the United States, the Federal Courts will follow the general law, and the decisions of the United States Courts rather than local law and the decisions of the state courts. If that was not the rule, then the decision of the state court would in effect, abrogate the Fourteenth Amendment to the Constitution of the United States, and permit the state to take a citizen's property by mere declaration that there was a benefit.

Ruling in the Earlier Cases.

In the earlier cases it was held, as a matter of law, that the right of way of a railroad was incapable of being benefited by local improvements.

Erie v. Piece of Land, 175 Pa. 523; 34 Atl. 808.

Philadelphia v. P. W. & B. R. Co., 33 Pa. 41.

Junction R. Co. v. Philadelphia, 88 Pa. 424.

Allegheny City v. W. P. R. R. Co., 138 Pa. 375; 21 Atl. 763.

Bridgeport v. N. Y. N. H. R. R. Co., 36 Conn. 255.

Boston v. B. & A. R. Co., 170 Mass. 95, 49 N. E. 95.

Naugatuck R. Co. v. Waterbury, 78 Conn. 193, 61 Atl. 474.

Fire R. Co. v. Paterson, 72 N. J. L. 83, 59 Atl. 1031.

D. D. G. H. & M. R. R. v. Grand Rapids, 106 Mich. 13, 63 N. W. 1007, 28 L. R. A. 793.

Lehigh Valley R. v. Jersey City, 81 N. J. L. 290, 80 Atl. 228.

Chicago, M. & St. P. v. Milwaukee, 89 Wis. 506; 62 N. W. 417, 28 L. R. A. 249.

In the case of *Philadelphia v. P. W. & B. R. R. Co.*, above cited, the court said:

"It would be strange legislation that would authorize the soil of one public road to be taxed in order to raise funds to make or improve a neighboring one."

The question came before this court in case of *L. & M. R. R. v. Barber Asphalt Co.*, 197 U. S. 430.

That was an appeal from the Court of Appeals of Kentucky. The Kentucky court had, in substance, held that the use or non-use or the character of the use does not determine the benefits, but that they must be determined apart from the particular use of the property. In affirming that declaration, this court said:

"The plea plainly means that the improvement will not benefit the lot because the lot is occupied for railroad purposes and will continue so to be occupied. That, apart from the specific use to which the land is devoted, land in a good sized city generally will get a benefit from having the streets about it paved, and that this benefit generally will be more than the cost, are propositions, which, as we already have implied, a legislature is warranted in adopting. But, if so, we are of the opinion that the legislature is warranted in going one step further and saying that on the question of benefit or no benefit the land shall be considered simply in its general relations and apart from its particular use. On the question of benefits the present use is simply prognostic and the plea of prophecy. If an occupant could not escape by professing his desire for solitude and silence, the legislature may make a similar desire fortified by structures equally ineffective. It may say that it is enough that the land could be turned to purposes for which the paving would increase its value. Indeed, it is apparent that the prophecy in the answer can not be regarded as absolute, even while the present use of the land continues; for no one can say that changes might not make a station desirable at this point; in which case the advantages of a paved street could not be denied."

The rule is thus stated in 25 Ruling Case Law, 144:

"It has frequently been stated as the rule that in determining whether an improvement does, or does not benefit property within the assessment district, the land should be considered simply in its general relations and apart from its particular use at the time; and an assessment, otherwise legal, is not void because the lot is not benefited by the improvement owing to its present particular use. The benefits are presumed to inure not to the present use, but to the property itself. Thus it has been decided that the fact that the property is occupied by a railroad track, or that it is used for a cemetery, or for purposes of religious worship, or is set apart for charitable or educational purposes, will not exempt it from assessment unless the statute so provides. So vacant or unimproved lots have been declared not to be immune from special sewer assessments, the benefit of the sewer being to the realty itself and not to the buildings or improvements thereon."

See also the following:

Bauman v. Ross, 167 U. S. 548.

Mangles v. Hudson County, 55 N. J. L. 88.

Tobie v. Broten, 20 Kan. 14.

Minn. Rate Case, 230 U. S. 352.

N. Y. N. H. & H. R. v. Village of Chester,
134 N. Y. S. 883.

Cache River Drainage Dist. v. Ry. 255 Ill. 398.

City of Kankakee v. Ill. Central, 263 Ill. 589.

Union Tank Line v. Wright, 249 U. S. 275.

II.

The conjectural and possible increase in transporting farm products resulting from the possible and probable clearing up and cultivating of unimproved lands, as a matter of law does not constitute benefits within the meaning of the Arkansas Act under discussion.

Out of this proposition there arise two questions. The first is that the evidence fails to show any enhancement in the value of the petitioners' property. The second is that, as a matter of law, the conjectural increase in future business is not a benefit within the meaning of the law.

In an early case, the Supreme Court of Arkansas seems to have so held.

In *Cribbs v. Benedict*, 64 Ark. 555, the Supreme Court of that state said:

"In estimating either the injuries or the benefits, those which the owner sustains or receives in common with the community generally, and which are not peculiar to him and connected with his ownership, use and enjoyment of the particular parcel of land, should be altogether excluded."

Notwithstanding that view, the Supreme Court of Arkansas, in some recent cases, and especially in the instant case, has taken the view that the evidence as to his possible future growth in business might be a benefit.

Oates v. Cypress Creek Drainage Dist., 135 Ark. 149.

St. L. S. F. Rd. Co. v. Ft. S. & V. B. Bridge Dist., 113 Ark. 493.

The same court in the Rock Island case, which is cited in the opinion in the instant case at page 323, of the transcript, apparently took the same view. See *C. R. I. & P. Ry. Co. v. Road Imp. Dist. No. 1, Prairie County*, 209 S. W. 725. See also *Mo. Pac. Ry. Co. v. Conway County Bridge District*, 134 Ark. 202.

In the Rock Island case, just cited, as we have elsewhere shown, this court has already granted the petition for a writ of certiorari, and that cause is now pending in this court for review, being brought here both by writ of error and by certiorari. In the instant case, as is shown by the evidence above referred to, the facts do not bring the assessments within the rule laid down by the Supreme Court of Arkansas in the above cases. In other words, the evidence in the case at bar, in no manner attempts to show that the railroad property will in any manner be enhanced in value. In the other cases referred to from the Supreme Court of Arkansas with the exception of the Rock Island case, probably there was at least some testimony tending to show that the railroad property was enhanced in value. In the present case the petitioners contend that there is not the slightest evidence tending to show that the petitioners' property will be benefited in the slightest degree. Even if we should be mistaken in that, it is well settled that such *possible future* increase in business does not constitute special peculiar benefits within the meaning of the law. Such possible future increase in business does not enhance the value of property, so as to constitute benefits.

In case of *N. Y. N. H. & H. Ry. v. Village of Fort Chester*, 134 N. Y. S. 883, the Appellate Division of the New York Supreme Court said:

"The only benefit that the learned corporation counsel specifically claims will inure to the railroad company from these improvements is an increase in its business following the increase in business and population resulting to the village from the improvement of its streets. This alleged benefit is too conjectural, fanciful and remote for consideration, and it seems highly improbable that the Legislature intended to tax the right of way on any such assumption. The corporation counsel's reasoning, if valid, would logically permit the taxation of any railroad right of way running through any village or city for general street improvements, however far from its right of way. Moreover, such a rule confuses the appellant's business growth with the value of its real estate."

Outside of the State of Arkansas, up to this time, we have not found any case holding to the contrary of that doctrine. The following cases declare the same rule:

Cache River Drainage Dist. v. Ry., 255 Ill. 398.
City of Kankakee v. Ill. Cent. R. R. Co., 263 Ill. 589, and cases therein cited.

The Supreme Court of Arkansas attempted to justify assessments against railroad property, on the theory of future benefits, by citing the case of *L. & N. Ry. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430. It is respectfully submitted that the Supreme Court of Arkansas has misunderstood the meaning of that case. This court, in that case, was not considering assess-

ments for the construction of a highway. The question was whether the grading, the curbing and paving in a street were such improvements as would benefit the property of a railroad company. In limiting the application of the decision, this court said:

"It will be noticed that the case concerns only grading, curbing and paving, and what we shall have to say is confined to a case of that sort."

The effect of that decision is simply to hold that the *physical* property of a railroad adjoining a local improvement, such as grading, curbing and paving, may be benefited. The principle upon which the case was affirmed is that the improvements described would be a *local benefit* to the *physical property* of the company. The case, therefore, is not an authority supporting the proposition that the *right of way* of a railroad company may be benefited by the construction of a competing line of highway. On the other hand, the case seems to recognize the soundness of the doctrine that a railroad right of way cannot be benefited by the construction of a public highway. This conclusion is deduced from the fact that this court refused to base its decision upon any benefit to the railroad property, *as such*. The decision was based upon a benefit to physical real property as such. In effect, therefore, the decision denies the contention that the use of railway property may be taxed with benefits for the construction of a public highway. It is therefore submitted that the case is an authority in support of the petitioners' contention in the case at bar.

It will be observed by this court that the assessors in this cause, arbitrarily disregarded the improvements on the real estate, although Section 2 of the Act in question requires the improvement to be included. See page 1405 of the Acts of Arkansas of 1915. The plan, therefore, of the commissioners thus indicated, was in itself, an arbitrary plan, in violation of the rights of the petitioners under the due process clause of the United States Constitution, because such plan as to lands, disregarded the improvements thereon, and at the same time as to the petitioners' property, considered and added all improvements thereon located. This plan was in itself an unlawful, arbitrary and confiscatory plan, in violation of the rights of the petitioners, as fixed by the decisions of this court under the Federal Constitution.

Union Tank Line v. Wright, 249 U. S. 275.

In that case, this court, speaking through Mr. Justice McReynolds, said:

"But if the plan pursued is arbitrary and consequent valuation grossly excessive, it must be condemned, because in conflict with the Commerce Clause or the Fourteenth Amendment, or both."

The petitioners contended that the Supreme Court of Arkansas in case of *Cribbs v. Benedict*, 64 Ark. 555, adopted the true rule on the subject under consideration. That rule is to exclude any general community benefits which may come in the future by reason of the probable increase in the cultivation and development of lands.

In still a later case the Supreme Court of Arkansas adopted a principle contrary to that adopted in the instant case.

In *Kirst v. Street Improvement District*, 86 Ark. 1, the Supreme Court of Arkansas said:

"Consideration should be given to all facts and circumstances tending to show special benefits received from the improvement not flowing to the community at large."

This declaration of the Supreme Court of Arkansas is in line with the general rule adopted in nearly all jurisdictions. It is respectfully submitted that upon the undisputed evidence, there is not a syllable of testimony to show that the property of petitioners would be enhanced in value. The only possible enhancement, and that is by inference only, would be the increase in the value of the physical land area embodied in the right of way. If that basis is accepted, the assessments would be at about \$1000 instead of \$67,900. Such would be the result, if the same method of assessment applied to lands should be applied to the acreage of the petitioners. This shows that the assessors have unreasonably fixed upon the petitioners' property a tax which is about sixty-five times as much as the commissioners and assessors put on their own lands. The facts bring to mind the public speech of a certain candidate for legislative honors, in the state. He vehemently urged the construction of innumerable highways throughout the state. He urged that that should be done now, while the farm-

ers could build these highways with other peoples money, referring, of course, to railroads and other public service corporations. The refusal of the Supreme Court of Arkansas to set aside these assessments, approved this unlawful action of the board of assessors, and denied to the petitioners, their protection, given them by the Federal Constitution.

III.

Assessments for local improvements in Arkansas can be sustained only when the benefits equal the assessments. The benefits represent the enhancement in value in the property, produced by the construction of the improvement.

In the case of *Rector v. Board of Improvement*, 50 Ark. 116, quoting from Judge Dillon on Municipal Corporations, the Supreme Court of Arkansas said:

"Special benefits to the property assessed, that is benefits received by it in addition to those received by the community at large, is the true and only solid foundation upon which local assessments can rest."

After quoting the above, the Supreme Court of Arkansas said:

"They are based upon the assumption that the persons upon whose property they are imposed, are specially and peculiarly benefited in the enhancement of the value of their property by the expenditure of the money collected on the assessment; and that while they are made to bear the cost of the local improvement, they at the same time suffer no

pecuniary loss thereby, 'their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay.' "

See also *Kirst v. Street Improvement Dist.*, 86 Ark. 1.

In case of *Board of Improvement District No. 1 of Fayetteville v. Pollard*, 98 Ark. 543, the Supreme Court of Arkansas reaffirmed the principle that property cannot be taken for the construction of an improvement unless that improvement specially and peculiarly benefits said property by enhancing the value of the property. After quoting from the case of *Rector v. Board of Improvement*, 50 Ark. 116, the same court said:

"The principle upon which these assessments for local improvements are made, is that by reason of the benefits received, no pecuniary loss can be suffered by the owner of the property in paying therefor. Therefore, where no benefits accrue, the property should not be made the subject of special assessment."

The same principle was announced by the Supreme Court of Arkansas in the following cases:

K. C. P. & G. Ry. Co. v. Water Works Imp. Dist., 68 Ark. 376.

Kirst v. Street Imp. Dist., 86 Ark. 1.

Ft. S. Light & Traction Co. v. McDonough, 119 Ark. 254.

In *Sweepston v. Avery*, 118 Ark. 303, the Arkansas Court said:

"The special assessments can be justified only upon the ground that the contemplated improvement is local in its nature, and that the property taxed will be specially and peculiarly benefited."

In all the cases in Arkansas, including every kind of local improvement, that court has uniformly and without dissent, always said that where the property did not receive a peculiar and special benefit, no assessment could be made against it. The Arkansas Court, in upholding that position, has unhesitatingly declared that the legislative determination of benefits by the Legislature was not at all conclusive upon the court.

In case of *Board of Improvement v. Pollard*, *supra*, on that subject the Supreme Court of Arkansas said:

"It has been held by this court that the legislative determination of the amounts and benefits to accrue to lands in improvement districts established by it is not entirely beyond judicial review; and that when such assessments are levied on property regardless of benefits, or where it is shown that no benefit can possibly accrue to the land from the improvement, relief can be sought in the courts against the collection thereof."

The following cases from the Arkansas Court declare the same rule:

St. L. S. W. Ry. Co. v. Red River Levee District, 81 Ark. 562.

Kauffman v. St. Francis Drainage Dist., 83 Ark. 54.

Moore v. Board of Directors, 98 Ark. 113.

The above rule that property cannot be assessed for a local improvement unless said property will be benefited by an enhancement in value equal to the assessment, has been applied by the Supreme Court of Arkansas to railroad property, where the local improve-

ment was a water works or a paving or other local street improvement. In every one of those cases, however, it was conceded by the Supreme Court of Arkansas, that no assessment could be made against railroad property, even for those classes of local improvements, unless the evidence showed that such railroad property was enhanced in value by reason of the improvement.

K. C. P. & G. R. R. v. Water Works Imp. Dist., 68 Ark. 376.

Ahern v. Board of Improvement, 69 Ark. 68.

In the last case the Supreme Court of Arkansas excluded from the Improvement District a certain spur track of the railroad because there was no proof that that spur track would be benefited by the contemplated street improvement. The Arkansas court has upheld assessments of benefits against railroad property, but only upon the showing that the railroad property was enhanced in value, and was actually benefited.

Improvement District No. 1 v. St. L. S. W. Ry. Co., 99 Ark. 508. In that case, the improvement contemplated was a water works system. The court held under the evidence that the property of the railroad company would be benefited. Not only has the Supreme Court of Arkansas held that no assessments can be made where the property will not be enhanced in value, but said court with much wisdom has protected the rights of property owners by holding that the assessments must be uniform. The Constitution of Arkansas requires all taxation to be uniform. The principle of equity and uniformity as to tax-

tion has been applied by the Supreme Court of Arkansas to special assessments for local improvements. In other words, the Supreme Court of Arkansas has held that the assessment of benefits can be levied only when the property is enhanced in value, but has also held that said assessments must be uniform, fair, just and equal.

Peay v. L. R., 32 Ark. 31.

Jones v. Pine Bluff, 49 Ark. 202.

Gregg v. Board of Improvement of Russellville, W. W., 84 Ark. 390.

Road Improvement District No. 1 v. Glover, 86 Ark. 231.

From the above cases, it is to be observed that the Arkansas Court has always protected property as against assessments for local improvements in cases where the property was not enhanced in value. Many times the question has been a serious one, as to what is an enhancement in value. If there is no enhancement in value, then there is no benefit to the property. The above cases from the Arkansas court also establish that principle.

IV.

The plan of assessment was arbitrary, unjust and confiscatory.

We do not deem it necessary to discuss that question further. The evidence in the record establishes the following:

1st. In assessing the farm lands lying on either side of the petitioners' right of way, the assessors failed to consider any use to which the lands were put, and disre-

garded the buildings and other improvements, although the Act of Arkansas expressly required the improvements to be included (Acts 1915, p. 1405). In *Kirst v. Street Imp. Dist.*, 86 Ark. 1, on that subject the Arkansas court said:

"The benefits, if any, to the buildings on the land cannot be arbitrarily disregarded. There are cases holding that only the benefits accruing to the land as such should be considered, and that the enhancement in value to the buildings should not be considered. Whether those cases are right or wrong, the statute in this state contemplates that any benefit accruing to the real property, including buildings, shall be considered."

2nd. In assessing the alleged benefits against petitioners' property, the assessors disregarded acreage, and based their assessments primarily and substantially upon the use of petitioners' property, including personal property and intangible values and elements.

3rd. In assessing the property of petitioners, all improvements located on said property were considered.

4th. In assessing the petitioners' property, the assessors began with an assessment of \$33000.00 per mile, which had been assessed by the State Tax Commission of Arkansas. The value fixed by the State Tax Commission included necessarily, as determined by the statute, the use of petitioners' property located outside of the State of Arkansas. In other words, in fixing the value at \$27000.00 per mile to \$33000.00 per mile, on petitioners' property, the State Tax Commission took into consid-

eration the use of petitioners' property in the transportation of property and passengers beyond the limits of the State of Arkansas. The assessors therefore necessarily included the franchise value and the going value of petitioners' property, and all its value derived from its use in Arkansas and in other states. This principle disregarded absolutely the acreage of the right of way of petitioners' property, and based the assessment primarily and necessarily upon the use of petitioners' property in Interstate Commerce.

5th. By reason of what is said in the last above number, it follows as a matter of law, that the said assessors included in their assessment against the property of the petitioners, a part of the personal property of petitioners, for the reason that petitioners' personal property inheres in the use of its property, and also for the further reason that the intangible values, including going value, also inhere in the value adopted by the commissioners. Therefore, the assessors used a part of petitioners' personal property and failed to use any personal property against any other tax payer, and even failed to use against the other tax payers the valuable improvements on the farm lands. It results therefore, that the assessors acting under the authority of said Alexander Law of Arkansas, have adopted a plan which results in assessing upon petitioners' property an arbitrary and unreasonable proportion of the cost of constructing the highway in question. It is respectfully submitted that such arbitrary action of the commissioners violates petitioners'

rights under the due process clause of the Federal Constitution.

Union Tank Line v. Wright, 249 U. S. 275.

Myles Salt Co. v. Ibernia Drainage Dist., 239 U. S. 478.

Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55.

V.

The said assessments, arbitrary, unjust and unreasonable as they are, constitute an unlawful burden on interstate commerce.

The evidence in the case shows that the petitioners are engaged in interstate commerce. There is only one station in Road Improvement District No. 6, the respondent. The line of railroad runs through six different states. Therefore substantially all of its commerce is interstate. While this court will not unnecessarily interfere with the taxing system of a state, it will not hesitate to do so in a case where the taxation is in plain violation of the due process clause of the Federal Constitution, and is also a burden upon interstate commerce.

Union Tank Line v. Wright, 249 U. S. 275.

In that case, this court said:

"A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the 14th Amendment, insofar, however, as moveables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value along with other property subject to its jurisdiction.

although devoted to interstate commerce. While the valuation must be just, it need not be limited to mere worth of the articles considered separately, but may include as well 'the intangible value due to what we have called the organic relation of the property in the state to the whole system.' How to appraise them fairly when the tangibles constitute part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisal producing results approximately correct—for example, the mileage basis in case of a telegraph company (*Western U. Teleg. Co. v. Atty. Gen.*), and the average amount of property habitually brought in and carried out by a car company (*American Refrigerator Transit Co. v. Hall*). But if the plan pursued is arbitrary and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause of the 14th Amendment or both."

After discussing other questions in the same case, it was also said:

"In other opinions of this court cited below to support the conclusion there reached, we upheld the power of a state to tax property actually within its jurisdiction upon a fair valuation considered as a part of a going concern; they give no sanction to arbitrary and inflated valuations. Taxes must follow realities, not mere deductions from inadequate or irrelevant data."

It is respectfully submitted that the assessment for the total sum of \$67,900.00 on 9.7 miles of railroad in a district about eleven miles long, under the circumstances detailed above necessarily creates an unlawful burden upon interstate commerce.

VI.

Petitioners' property is a right of way, and therefore a mere easement.

We desire to call the court's attention to this matter, because justly a mere easement cannot be assessed in the same degree and in the same way as the fee. It is held in Arkansas that the right of way of a railroad company is a mere easement.

Herden & Ft. S. Ry. Co. v. Vaught, 97 Ark. 234.

If the petitioners should ever abandon this right of way, the land will revert to the adjoining land owners. Therefore, the assessments cannot possibly be sustained upon the principle in *L. & N. Ry. Co. v. Barber Asphalt Co.*, *supra*. The cause does not turn upon this point, but we call the court's attention to it in order to show that there is less merit in making such exorbitant assessments against a mere easement than there is in cases where the fee is involved.

See also:

Brown v. Young, 69 Iowa 265.

Lidgerding v. Zinego, 77 Minn. 421; 6 Am & Eng. Enc. of L. p. 531.

Clayton v. C. I. & S. R. R., 67 Iowa 238.

Appeal of Hoffman, 118 Pa. 512.

VII.

The action of the assessors, in including the improvements on petitioners' property, and including the personal property, and taking into consideration all its intangible values and its use in interstate commerce, necessarily, and as a matter of law, assesses benefits upon petitioners' personal property.

This question came before the Supreme Court of Iowa in case of *C. M. & St. P. Ry. Co. v. Phillips*, 111 Iowa, 377. In holding that the assessments made under circumstances similar to those made in the case at bar, included assessments against personal property, the Iowa court said:

"We have stated sufficiently the provisions of these sections to show that the assessments made by the executive council included personal as well as real property. The value of the personal property of such corporations forms an important factor in estimating the value of their property used in the operation of the road, and in many instances largely exceeds the value of the real estate so used. The tax in question was levied upon the valuations of plaintiffs' property assessed by the executive council, and is, therefore, in part, a tax on personal property to pay for the construction of a sewer, and to that extent is unquestionably illegal and void, as only real estate may be taxed for that purpose."

That principle applies in case at bar, and necessarily makes all of these assessments void, and thereby denies the petitioners their rights under the Federal Constitution. See also *Chatham County v. Seaboard Air Line*, 133 N. C. 216.

VIII.

The questions involved are grave and important. Can a country highway of this kind be built by local assessments levied upon a mere easement and the use of the same by railroad company? The contemplated highway is a public highway built for the use of the county and the public in general.

The shocking disparity—assessing farm lands without improvements at an average of about \$7.00 per acre, and the petitioners' right of way and property which runs through these same farm lands, at a figure amounting to \$525.00 per acre, more than sixty-five times what it ought to be upon the principle of equality and uniformity—in the assessments is alone sufficient to challenge the serious consideration of this court, because said procedure invades the petitioners' rights in violation of the Federal Constitution.

The "local" improvement contemplated is not a gutter, sewer or a pavement in a town, but is a common public highway in the country, built for the general use of the general public, and that too, upon an agreement between the commissioners and the County Court, the latter under the Arkansas Constitution (Section 28, Article 7), having sole jurisdiction of *county roads*, that *this highway when built should be turned over to the County Court as a part of the public roads of the county*, thus showing that the "improvement" is general and not local. On this subject there is no dispute in this record.

Under date of July 29, 1918 (See Tr. p. . .), the commissioners and the County Court, by order of the latter, expressly agreed that this road was to be con-

structed as a public highway, and turned over to the county. In the record of the County Court of that date appears the following:

"And whereas it is the intention of the commissioners of said district to complete said improvement as soon as practicable, and to turn the same back to the county upon its completion, *which will be accepted by this court, when completed, as a part of the county highway system.*"

This demonstrates that the promoters of this improvement district have not only wronged the petitioners by the unfair and unjust assessments complained of, *but are using the local improvement district law for general taxation to build a highway for the general benefit of the general public.* This is all the more reason why these proceedings are repugnant to the Federal Constitution.

Gray on Limitation of Taxing Power, Section 1865, on the subject of local assessments to construct highways for the general public, the author says:

"Local assessments for laying out country or suburban highways, therefore, have generally been held unconstitutional, as taking property without due process of law, and, in states where the constitution requires equality and uniformity, as lacking in those respects."

See also cases cited in Note 85 to that Section. This weakness of these proceedings is emphasized by the further suggestion that the assessments in controversy are against *a railroad right of way, and the use thereof not as physical real property, but as a going concern,* used in interstate commerce, the right of way being a mere

easement. *It is also suggested that it is still a graver question as to whether one right of way and the use thereof belonging to a public highway, such as a railroad, can be charged with local assessments to construct a dirt highway, the latter being a competitor of the former.* To assess the business of one highway for the purpose of constructing another highway seems to be taking property without due process of law. It has been held in many jurisdictions that a mere easement such as a right of way and the use thereof, *cannot as a matter of law, be benefited by a local improvement, such as that in controversy.*

Detroit etc. R. R. v. City of Grand Rapids, 106 Mich. 13.

Philadelphia v. Philadelphia etc., R. R., 33 Pa. St. 43.

It has also been held as a matter of law, that the construction of a highway parallel with a railroad company *cannot possibly enhance, either directly or indirectly, the value of the railroad property.*

City of Bridgeport v. N. Y. etc. R. R., 36 Conn. 255.

See also:

Junction Ry. Co. v. Philadelphia, 88 Pa. St. 424.

Borough of Mt. Pleasant v. B. & O. Ry., 138 Pa. St. 365.

Allegheny City v. W. Pa. Ry. Co., 138 Pa. St. 375.

Chicago, etc. Ry. v. City of Ottumwa, 112 Iowa, 300.

N. J. etc Ry. Co. v. City of Elizabeth, 37 N. J. L. 330.

See *City of Boston v. Boston etc. Ry. Co.*, 170 Mass. 95.

Matter of Town of Gates, 8 N. Y. S. 247.

Conclusion.

The evidence will warrant the assertion that the land owners, through the assessors and the commissioners, are endeavoring to fix upon the property of the petitioners an unjust and unreasonable proportion of the burden of constructing a highway. It seems reasonably certain from the undisputed evidence, that the assessors and commissioners, some of whom are the land owners to be benefited, are attempting to take from the petitioners a very great amount of property, and to use that property in the construction of a highway, to the end that the lands of the farmers may have a better transportation line than they now have from their farms to their markets. Upon these facts, a grave question is brought before this court.

The undisputed evidence shows that such elements of benefit as those above referred to were not considered in any degree in making the assessments against other property. The other property was assessed at a fixed sum per acre, *regardless of any use thereof*. The result is that the petitioners' property is assessed with a view to its use; whereas all other property is assessed by the acre, and at a fixed sum per acre, *and at an exceedingly small sum at that*. This necessarily results in an unlawful and unjust discrimination against the petitioners, and in an assessment against their property, which is so exorbitant and excessive, as to amount to a burden upon interstate commerce, and a taking of their property without due process of law, and a denial to them of the equal

protection of the law. The property of the petitioners is devoted exclusively to railroad purposes, and is used principally in interstate commerce.

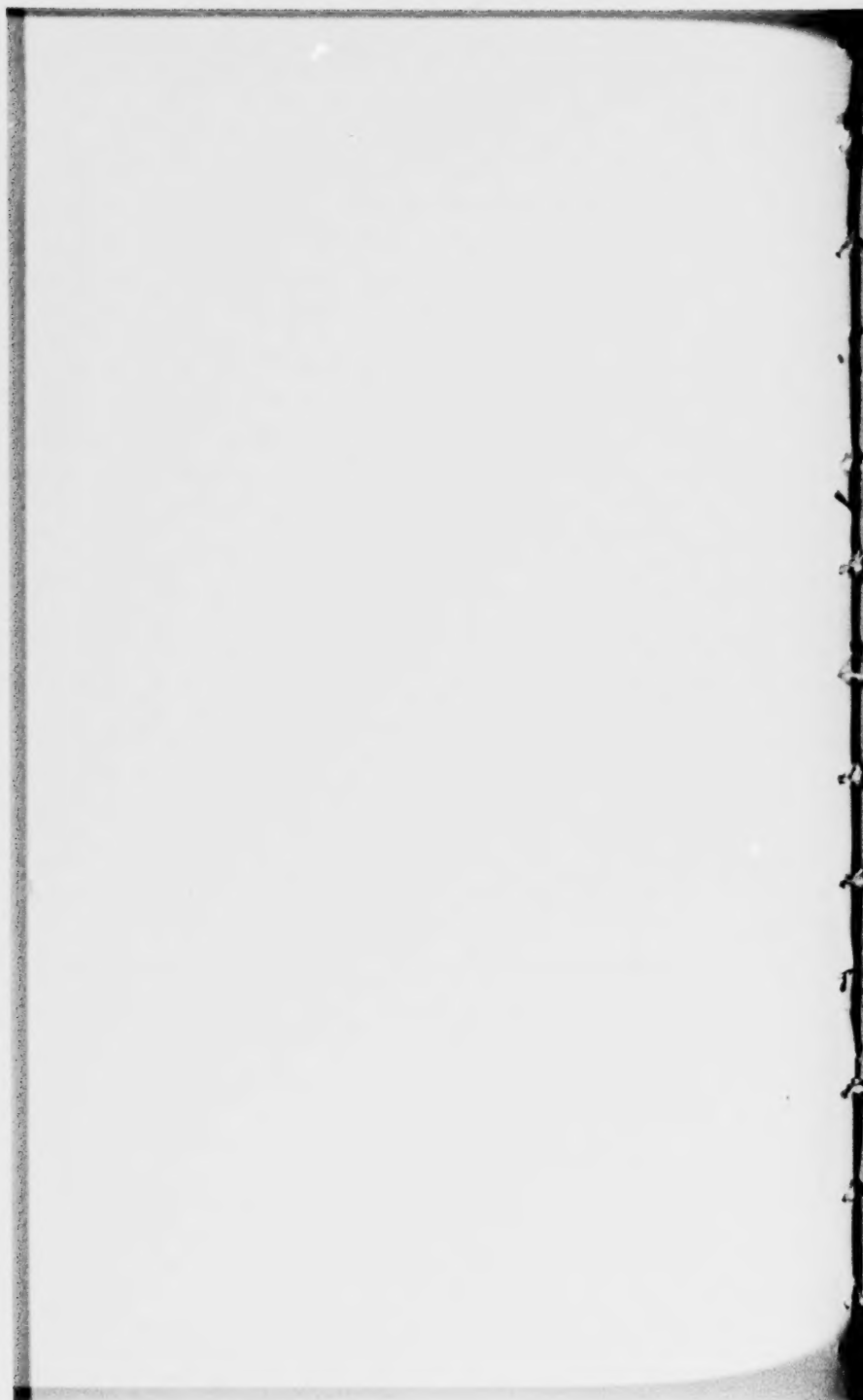
The property of the petitioners is a part of a through line of railroad. It is therefore our contention that the said assessments made under the authority of the Act of the General Assembly of Arkansas, are in violation of the petitioners' rights under the clauses of the Constitution above referred to. We think the principles contended for are sustained by this court in *Martin v. District of Columbia*, 205 U. S. 135. A great disparity between the assessments made against the private land owners and the property of the petitioners is such that it results in a denial of the petitioners' rights, in violation of the Federal Constitution, as heretofore claimed. The Supreme Court of Arkansas, by refusing to set aside said assessments, thus denied to the petitioners, the equal protection of the laws, and deprived them of their property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and also in violation of their rights under the commerce clause, as heretofore contended. It is therefore believed by counsel for the plaintiffs in error, that the action of the assessors and the courts, in confirming the assessors' action, is repugnant to said Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the commerce clause of said Constitution.

It is therefore respectfully submitted that the judgment and proceedings of the Supreme Court of the State of Arkansas should be reversed.

Respectfully submitted,

JAMES B. McDONOUGH,
Counsel for Plaintiffs in Error.

F. H. MOORE,
SAMUEL W. MOORE,
A. F. SMITH,
Of Counsel.



JAN 24
JAMES V. L.

No. **205**

IN THE
Supreme Court of the United States

OCTOBER TERM, 1919.

THE KANSAS CITY SOUTHERN RAILWAY
COMPANY AND THE TEXARKANA &
FT. SMITH RAILWAY COMPANY,
PLAINTIFFS IN ERROR,

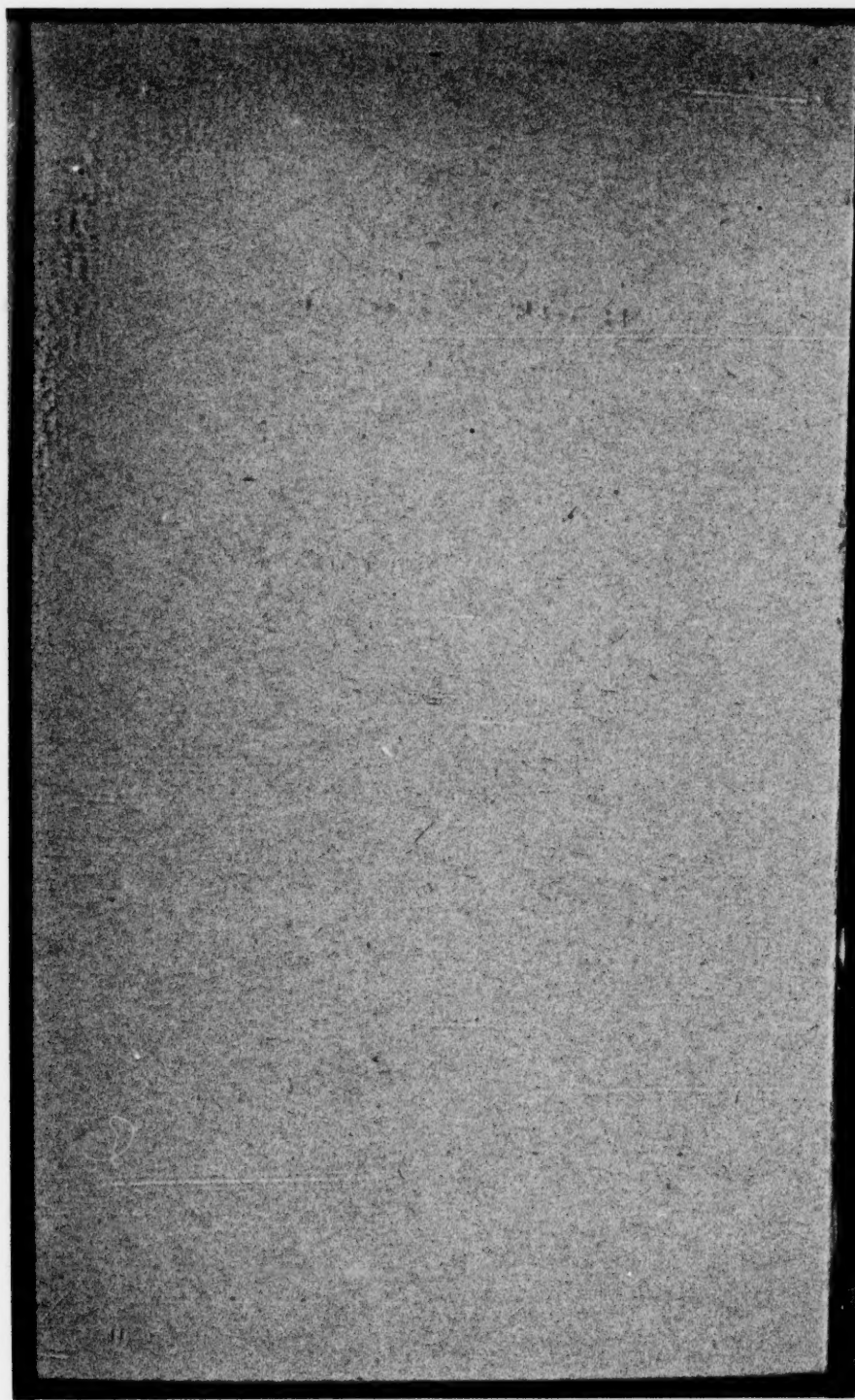
VS.

ROAD IMPROVEMENT DISTRICT NO. 6, OF
LITTLE RIVER COUNTY, ARKANSAS,
DEFENDANT IN ERROR.

**ABSTRACT AND BRIEF FOR DEFENDANT IN
ERROR.**

JOHN P. DuLANEY,
Ashdown, Arkansas,
Attorney for Defendant in Error.

A. D. DuLANEY,
Of Counsel.



INDEX.

	Page
A. Brief, Legal History of this Case.....	1
1. The Organization of Road Improvement District No. 6 of Little River County, Arkansas.	1
2. Litigation by Plaintiffs in Error.....	5
3. Brief Review of the Decisions of the Ar- kansas Courts.	9
(a) Little River County Court	9
(b) Little River Circuit Court.....	10
(c) The Arkansas Supreme Court... ..	11
B. Statement of the Facts of the Case.....	13
C. Federal Questions Involved in this Case.....	18
D. Brief of Argument for Defendant in Error..	20
I. Meaning of the Term "Benefits".....	20
II. The Franchise Value and Personal Prop- erty of the Railway Company were not included in the assessment of "benefits" by the Assessors in this Case.....	23
III. This Court will Not Review Purely State Questions which Plaintiffs in Error seek to bring into this Case.....	23
IV. The Property of Plaintiffs in Error will be Benefited by Reason of the Construc- tion of the Proposed Highway.....	29
1. Railway Property is Subject to As- sessment to Help Pay Cost of Con- structing a Local Public Improve- ment where the Evidence Shows That it will be Benefited Thereby	29

INDEX.

	Page
2. The Railway Property in this Case will be Benefited by the Construction of the Proposed Highway as a Matter of Law.	30
3. A Review of the Evidence Shows that the Property of Plaintiffs in Error will be Benefited by Reason of the Construction of the Proposed Highway, as a Matter of Fact.	31
A. Witnesses for Plaintiffs in Error.	31
(1) Qualification of Witnesses and General Character of their Testimony	31
(2) Testimony of Witnesses.	34
(a) E. Phelps	34
Comments on Phelps' Testimony.	37
(b) J. H. Williams	39
(c) J. M. Wier	39
Comments on Wier's Testimony.	41
(d) A. Leckie	43
Comments	43
(e) E. E. Holden	44
Comments	44
(f) J. J. Taylor	45
Comments	46
(g) J. J. Hancock	47
Comments	48
B. Testimony of Witnesses for Defendant in Error	49
1. Resume of Testimony on Question of Benefits to Property of Railway Company.	49

INDEX.

	Page
(a) Joel Mills	49
(b) L. G. Ferrell	52
(c) Dr. A. N. Wood	53
(d) A. D. DuLaney	55
(e) Dr. C. E. May	55
(f) P. S. Kinsworthy	56
2. Comments on Evidence of Wit- nesses for Defendant in Error.....	57
(a) Qualifications of the Witnesses.	57
(b) Points Established by Evidence of Witnesses for the Road District...	60
3. Conclusiveness of Finding of Facts by the Officials of the Road Improve- ment District and by the Arkansas Courts.	63
V. Plaintiffs in Error have not been denied the Equal Protection of the Laws in Vio- lation of Section 2 of the 14th Amend- ment of the Constitution of the United States.	65
1. Proper Legal Notice was given as Required by the Statute.....	65
2. State can Classify Property for Purposes of Taxation	65
3. Plaintiffs in Error have not been Discriminated Against Unfairly	69
VI. The Assessment of Benefits Amounting to \$67,900 on Property of Plaintiffs in Error does not Deprive them of their Property Without due Process of Law	71
A. Meaning of "Due Process of Law"	71

INDEX.

	Page
B. Application of the Doctrine of Due Process to this Case	72
C. Plaintiffs in Error have not been Deprived of their Property Without Due Process of Law by the Procedure in this case	75
VII. The Assessment of "Benefits" and Levy of a Special Tax Thereon, on the Railway Property, does not Violate the "Interstate Commerce" Clause of the United States Constitution.	94
I. Aim of the Tax.....	94
VIII. Reference to Cases Cited in Brief of Plaintiff in Error	97
IX. Conclusion.	101

Cases Cited.

Adams Express Co. vs. Ohio, 165 U. S. 194.....	95
Alcorn vs. Bliss, 133 Ark. 118.....	24
Alcorn vs. Oak Co., 133 Ark. 118	30
Ballard vs. Hunter, 204 U. S. 241.....	65
Baltimore Tr. Co. vs. Balt. Ry. Co., 151 U. S. 137.	29
Bank vs. Pa., 167 U. S. 461.....	70
Bauman vs. Ross, 167 U. S. 548.....	31
Bauman vs. Ross, 167 U. S. 589.....	25
Bells Gap R. R. Co. vs. Pa., 134 U. S. 237.....	29
Bill's Gap Ry. Co. vs. Pa., 134 U. S. 232	67
Bowman vs. Ross, 167 U. S. 548.....	76

INDEX.

	Page
Branson vs. Bush, 251 U. S. 184.....	74
Breen vs. Frazier, 40 Sup. Ct. 501.....	82
Burr vs. Drainage Dist., 223 S. W. 362.....	30
Bush vs. Branson, 251 U. S. 184.....	29
Bush vs. Branson, 251 O. S. 184, 40 Sup. Ct. 113.	23
Bush vs. Rd. Imp. Dist., 216 S. W. 691.....	30
Cemetery Assn. vs. Mullins, 248 U. S. 501.....	76
Cleveland R. R. Co. vs. Backus, 154 U. S. 439...	24
Cleveland Ry. Co. vs. Backus, 154 U. S. 439.....	95
Cleveland Ry. Co. vs. Porter, 210 U. S. 178.....	29
Davidson vs. New Orleans, 96 U. S. 97.....	77
Davies vs. Drainage Dist., 112 Ark. 357.....	30
Embee vs. K. C. Rd. Dist., 240 U. S. 242	76
Fallbrook Irrig. Dist. vs. Bradley, 164 U. S. 112...	31
Fallbrook Irrig. Dist. vs. Bradley, 164 U. S. 112..	76
Fallbrook Irrig. Dist. vs. Bradley, 164 U. S. 112..	25
Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 112	64
Ficklen vs. Taxing Dist., 145 U. S. 1.....	95
Giazza vs. Fiernan, 148 U. S. 657	71
Gloucester Ferry Co. vs. Pa., 114 U. S. 196.....	95
Goldsmith vs. Prendergast Construction Co., 40 Sup. Ct. 274	74
Hagar vs. Reclamation Dist., 111 U. S. 701.....	28
Hagar vs. Recla. Dist., 111 U. S. 701.....	94
Hagar vs. Reclam. Dist., 111 U. S. 701.....	76
Hancock vs. Muskogee, 250 U. S. 454.....	28
Hibben vs. Smith, 191 U. S. 310.....	76

INDEX.

	Page
Hill vs. Echols, 140 Ark. 474.....	30
Hines vs. Rd. Imp. Dist., 224 S. W. 817.....	29
Hines vs. Road Imp. Dist., 224 S. W. 817.....	26
Holden vs. Hardy, 169 U. S. 366.....	71
Houck vs. L. R. Drain. Dist., 239 U. S. 254.....	31
Houck vs. Drainage Dist., 239 U. S. 255.....	25
Houck vs. Drainage District, 239 U. S. 262.....	73
Huling vs. Imp. Co., 159 U. S. 526.....	65
Ill. Cen. R. Co. vs. Decatur, 147 U. S. 190.....	29
Jett Bros. Distilling Co. vs. Carrollton, 40 Sup. Ct. 256.	75
Keeney vs. New York, 222 U. S. 535.....	68
Kelly vs. Pittsburg, 104 U. S. 78.....	88
Kennard vs. Louisiana, 92 U. S. 480.....	71
Kilbourn vs. Thompson, 103 U. S. 168.....	72
King vs. Portland, 184 U. S. 61.....	29
Lee vs. Central of Georgia Ry. Co., 40 Sup. Ct. 254.....	28
Leeper vs. Texas, 139 U. S. 462.....	72
Lent vs. Tilson, 140 U. S. 316.....	76
Londoner vs. Denver, 210 U. S. 388.....	77
L. & N. R. R. Co. vs. Barber Asphalt Pav. Co., 197 U. S. 430.	29
Lowe vs. Kansas, 163 U. S. 81.....	67
Marvin vs. Trout, 199 U. S. 212.....	27
Mattingly vs. Dist. of Columbia, 97 U. S. 602.....	93
Maxwell vs. Bugbee, 40 Sup. Ct. Rep. 6.....	68
Memphis Gas-Light Co. vs. Taxing Dist., 109 U. S. 398.	67
Minn. Iron Wks. vs. Kline, 199 U. S. 593.....	29
Mo. Pac. Ry. Co. vs. Conway Co. Bridge District, 218 S. W. 189.....	24
Mo. Pac. Rd. Co. vs. Conway County Bridge District, 134 N. S. 299.....	92

INDEX.

	Page
Mo. Pac. Ry. Co. vs. Road Improvement District, 137 Ark. 573	90
Mo. Pac. Ry. vs. Bridge Dist., 218 S. W. 189.....	30
Mo. Pac. Ry. Co. vs. Conway Co. Bridge Dist., 134 Ark. 292	29
Mobile Co. vs. Kimball, 102 U. S. 691	28
Moore vs. Levee Dist., 98 Ark. 113	30
Norwood vs. Baker, 172 U. S. 269.....	71
Oates vs. Drainage Dist., 135 Ark. 152.....	29
Oates vs. Drainage District, 135 Ark. 149.....	24
Ochoa vs. Morales, 230 U. S. 161.....	71
Palmer vs. McMahon, 133 U. S. 660.....	76
Patterson vs. Road Imp. Dist., 219 S. W. 341....	23
Paulsen vs. Portland, 149 U. S. 29.....	65
Pearson vs. Yewdall, 95 U. S. 294.....	76
Railway Co. vs. Backus, 154 U. S. 421.....	76
Railroad Co. vs. Bridge Dist., 113 Ark. 493.....	29
Railroad Co. vs. Cleveland, 235 U. S. 50.....	27
Railway Co. vs. McDonald, 214 U. S. 191.....	27
Railway Co. vs. Mathews, 174, U. S. 105.....	67
Ry. Co. vs. Texas, 210 U. S. 217.....	95
Reisinger vs. Road Imp. Dist., 220 S. W. 455....	26
Rock Is. R. R. vs. Rd. Imp. Dist., 137 Ark. 587....	29
Robbins vs. Taxing Dist., 120 U. S. 489.....	95
Royster Quana vs. Virginia, 40 Sup. Ct. Rep. 561	66
St. Mary's Cemetery Assn. vs. Millins, 248 U. S. 505.	81
St. L. Ry. Co. vs. Arkansas, 235 U. S. 350.....	95
S. L. Rd. Co. vs. Bridge Dist., 113 Ark. 496.....	92
St. L. S. W. Ry. Co. vs. Ark., 234 U. S. 350.....	67
Solian vs. Heskin, 22 U. S. 523.....	76

INDEX.

	Page
Spencer vs. Merchant, 125 U. S. 345.....	28
Spencer vs. Merchant, 125 U. S. 345.....	76
Spring Valley Waterworks vs. Schottler, 110 U. S. 354.	90
Sugar Ref. Co. vs. La., 179 U. S. 89.....	67
Telegraph Co. vs. Philadelphia, 190 U. S. 160....	95
Tinsley vs. Anderson, 171 U. S. 101.....	67
Trimble vs. Seattle, 231 U. S. 683.....	70
Turpin vs. Lemon, 187 U. S. 51.....	71
Turner vs. Wade, 41 Sup. Ct. 28.....	76
Underwood Typewriter Co. vs. Chamberlain, 41 Sup. Ct. 45	95
Union Tank Line vs. Wright, 249 U. S. 275.....	95
Voight vs. Detroit, 184 U. S. 115.....	25
Wagner vs. Baltimore, 239 U. S. 207.	31
Wagner vs. Leser, 239 U. S. 216	74
Walker vs. Sawinet, 92 U. S. 90.....	72
Walston vs. Mevin, 128 U. S. 578.....	76
Walston vs. Nevin, 128 U. S. 578.....	28
Watson vs. Comptroller of New York, 41 Sup. Ct. 44	66
Watson vs. Nevin, 128 U. S. 578.....	70
Wells-Fargo vs. Nevada, 248 U. S. 165.....	76
Wells-Fargo Co. vs. Nevada, 248 U. S. 165.....	95
Wilkinson vs. Road Imp. Dist., 141 Ark. 164....	23
Wilkinson vs. Road Imp. Dist., 141 Ark. 164....	26
Wilkinson vs. Road Imp. Dist., 141 Ark. 168....	91
Willoughby vs. Chicago, 235 U. S. 45.....	29
Withnell vs. Ruecking Const. Co., 249 U. S. 63..	28
Withnell vs. Ruecking Const. Co., 249 U. S. 71...	81
Wis. R. R. Co. vs. Powers, 191 U. S. 379.....	95
W. U. Tel. Co. vs. Texas, 105 U. S. 46.....	95

No. 620.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1919.

THE KANSAS CITY SOUTHERN RAILWAY
COMPANY AND THE TEXARKANA &
FT. SMITH RAILWAY COMPANY,
PLAINTIFFS IN ERROR,

VS.

ROAD IMPROVEMENT DISTRICT NO. 6, OF
LITTLE RIVER COUNTY, ARKANSAS,
DEFENDANT IN ERROR.

**ABSTRACT AND BRIEF FOR DEFENDANT IN
ERROR.**

("Rec.") equals "Record";

("Pl. Br.") equals Plaintiffs in Error's Brief").

A. BRIEF LEGAL HISTORY OF THIS CASE.

1. The organization of Road Improvement District No. 6 of Little River County, Arkansas.

Defendant in error is a highway improvement district, validly organized, pursuant to the provisions of a general statute known as the "Alexander Road Law,"

which is Act No. 338 of the Acts of the General Assembly of the State of Arkansas, 1915 (p. 1400). By Section 4 of said act this district became, after the County Court of Little River County, Arkansas, made an order dated May 14th, 1918 (Rec. 40), establishing said district, a body politic and corporate, to be known as "Road Improvement District No. 6 of Little River County, Arkansas;" and by said name it has a legal status and may sue and be sued, plead and be impleaded, and have perpetual succession for the purpose of building and repairing the roads in said district.

Proper petitions praying for formation of the road improvement district were filed, and after proper legal notice (Rec. 14) by publication to all property owners, including the plaintiffs in error, the County Court fixed a date, namely, May 14th, 1918, for hearing the objections of all persons or corporations owning property within the proposed district described in the notice of the formation of the district.

Notwithstanding plaintiffs in error owned 9.7 miles of main track, 1.68 miles of side track, and station buildings lying within the proposed road improvement district, and that requisite legal notice had been published, they did not appear, and there and then object to the organization of said road improvement district.

On said final hearing date, namely, May 14th, 1918, the Little River County Court made an order, which by Section 3 of said Act No. 338 of the Acts of Arkansas, 1915, had all the force and effect of a conclusive judgment, establishing the said defendant in error district

(Rec. 40-2). The plaintiffs in error did *not* appeal from said order, and did not object to the formation of said Road Improvement District No. 6, which embraced several miles of their railroad tracks, right of way, and station buildings.

Pursuant to the provisions of said Act No. 338, the County Court appointed three landholders to serve as a Board of Commissioners, and three other landholders to serve as a Board of Assessors of said Road Improvement District (Rec. 42-4). The members of said boards qualified and the two boards were organized and each board performed its respective duties, regularly and properly, as required by law. As plaintiffs in error do not challenge the validity of defendant road improvement district, and as said question is not a controverted issue in this court, we do not deem it necessary to set out the various steps taken in the organization of said road improvement district, nor the various official acts performed by the different boards and officers.

In accordance with the provisions of the statute (Sections 11-13 of Act 338), and by direction of orders of the County Court and the Board of Commissioners, the Board of Assessors met in their capacity as a board or quasi-judicial tribunal, and assessed the "benefits" on all real property lying within the road improvement district, which benefits they thought would accrue to the respective tracts or parcels of property during the life of the improved highway (Rec. 21, 22, 43, 47), and said assessors transmitted their list of benefits assessed, to the

Board of Commissioners, who in turn filed the same with the clerk of the County Court (Rec 47-9; 52-112).

In compliance with Section 11 of said Act 338, the Board of Assessors assessed "benefits" on the property of plaintiffs in error on a mileage basis, fixing the amount of benefits at \$7000.00 per mile, and multiplying the same by 9.7, the total mileage of the main railroad track within the road district, we find the total benefits assessed on the property of the railway companies to be \$67,900.00 (Rec. 110).

Subsequently, pursuant to Section 13 of said Act 338, the County Court by order dated August 5th, 1918, (Rec. 45) fixed a day, namely, August 23rd, 1918, for hearing all property owners who might desire to have any grievous or wrongful assessment of benefits corrected. Lawful notice of such hearing was given by publication by the county clerk (Rec. 24-5), in which notice the plaintiffs in error were specially warned to appear.

For the *first time* plaintiffs in error appeared in the Little River County Court and raised their voice in objection to the formation of the district, after it had been validly established for over three months, and objected to the assessment of any benefits whatever against their property, alleging that said Boards of Assessors and Commissioners and the County Court had no "power or authority whatever to levy and fix against the property of said railway companies *any assessment of any benefits whatever*" (Rec. 25-9).

2. **Litigation by Plaintiffs in Error.**

The plaintiffs in error first began the litigation in this case by filing in the little River County Court, on August 23rd, 1918, a remonstrance or "Bill of Objections" to the assessment of benefits on their property. This was the day appointed for hearing all property owners who desired to protest as to the amount of benefits assessed on their property, and to petition or pray the County Court to reduce the same if it were shown to be burdensome. Section 13 of said Act 338 concludes: "The County Court shall hear and determine the justness of any assessment of benefits, or damages, and is hereby authorized to equalize, lower or raise any assessment upon a proper showing to the court."

It is noticeable that although previous to the date of hearing, the Arkansas Supreme Court and this court had held, repeatedly that the property of a railroad company was subject to taxation to help defray the cost of a local public improvement which would result in benefit to its property, the plaintiffs in error *claimed absolute exemption* from any tax at all, and that is their claim through all the stages of this litigation up to this good hour. They denied the power or authority of any court or any board of local improvement to assess any benefits against the properties of said railroad companies. They attacked the validity of the formation of the district, which attack was held to be too late. They "denied that they are benefited in any way whatever" or that their property would be enhanced in any manner. They declared that the "assessment of benefits amounting to

\$67,900.00 is unreasonable, arbitrary, unjust and unlawful," but the record does *not* disclose that they prayed the County Court to reduce said assessments one penny, or that they adduced proof to show that the amount levied was oppressive, and what amount would be fair and reasonable (Rec. 25-9).

The County Court overruled the railway company's remonstrance, and issued an order confirming and approving the assessment of benefits, and found that the assessment of benefits against all property within the district "are justly and equitably made" and specifically approves the assessment of benefits made against the property of plaintiffs in error (Rec. 46-7).

As stated above, it is strangely noticeable that plaintiffs in error called no witnesses in this hearing on the correctness of assessment of benefits to establish their contention that the apportionment of benefits upon their property was excessive. In the absence of proof the County Court could not properly, of its own motion, reduce said assessments of benefits on their property. The County Court chose to follow the report and declaration of the board of assessors, which in its letters of transmittal had stated that it had met and made the assessment of benefits according to law, which they "believe will accrue to the various tracts of land and *railroads* and other real property within said district by reason of the construction of the gravel road within said district." * * * and they believe that the assessment of benefits against the several and particular tracts of land, *railroads* and other real property hereinafter set out is fair, just

and equitable to all owners of property assessed in the district (Rec. 47-8; 52; 111).

The plaintiffs in error filed their petition, affidavit and bond for appeal to the Little River Circuit Court, and said appeal was granted. In their prayer for appeal and supporting affidavit, the plaintiffs in error repeat in substance their formal written objections which they had offered in the County Court, again claiming steadfastly and repeatedly that their property could *not* be taxed by the assessment of special benefits; that the district was illegal and void; and that their property would not be benefited by the construction of the highway and improvement contemplated (Rec. 30-4; 50).

Plaintiffs in error had their trial on appeal, in the Little River Circuit Court on February 19th, 1919. They filed their same "Bill of Objections" or remonstrance which they had offered in the County Court, and which had been overruled (Rec. 118-122). They also filed in the Circuit Court their petition of appeal from the County Court, and accompanying affidavit (Rec. 122-26). The Circuit Court sustained a demurrer of the defendant in error to the first four paragraphs of the "Bill of Objections," except the court reserved the right to pass upon the question of the assessment of benefits being arbitrary and confiscatory (Rec. 116; 126-9).

In the Circuit Court the case went to trial upon the question of the fact of benefits to the property of plaintiffs in error and the correctness of the proportion of "benefits" assessed, and whether said assessments were

arbitrary and excessive. The trial on appeal was limited to those issues and as to said issues the trial was *de novo*.

In said trial in the Circuit Court the plaintiffs in error called seven witnesses, six of whom were employees of said railway companies. The testimony of said witnesses and of those presented by the road district will be hereinafter reviewed. Suffice it here to say—and we beg the court to bear this unique point in mind—that each and all of the witnesses for the plaintiffs in error, who were employees of the plaintiffs in error, testified positively on direct examination that the property of the railway companies would *not* receive any special, direct or peculiar benefit by reason of the proposed gravel highway being constructed, but that said new highway would be a general community benefit, and they admitted that the railway companies would share in said common benefit. Also, we desire to emphasize for the court's attention, that plaintiffs in error adduced no proof whatever that the amount of "benefits" levied on their property was excessive, arbitrary or confiscatory, or what amount would be a fair and just apportionment of said special tax. They stoutly maintained—and their evidence from their witnesses on that point is cumulative—that they would receive absolutely *no benefit* whatever, and therefore they should not be assessed in any amount.

At the close of the trial the Circuit Court had, on the one hand, the proof on the part of the railway companies that no benefit whatever would accrue to their property if the gravel highway proposed were built; and

on the other hand, it had the testimony of witnesses—mostly commissioners and assessors of the district—that the railroad property would be benefited, and that the assessments of benefits thereon was equitable and just. There was no word of testimony about the assessments being arbitrary, unfair, oppressive and confiscatory. The Circuit Court had no “middle ground” basis upon which to predicate a judgment. The Circuit Court, in the absence of proof on the issue, did not reduce the assessment on the railway’s property. The judgment of the County Court was affirmed, and the assessments of benefits on the railway’s property was left undisturbed (Rec. 166).

Plaintiffs in error prayed and were granted an appeal from the judgment of the Circuit Court to the Supreme Court of Arkansas (Rec. 117, 187-9).

The Arkansas Supreme Court delivered its opinion on July 14th, 1919, in which it affirmed the judgment of the Little River Circuit Court (Rec. 191-4). Thereupon, plaintiffs in error filed their petition for rehearing. With assignment of errors, which petition for a rehearing was denied on September 29th, 1919 (Rec. 195-99). Whereupon, plaintiffs in error prayed and was granted on November 5th, 1919, a writ of error to the United States Supreme Court (Rec. 199-214).

3. Brief review of the decisions of the Arkansas Courts.

(a) Little River County Court.

The Little River County Court on May 14th, 1918, made an order establishing defendant in error road dis-

trict, and on August 23rd, 1918, after a hearing on the matter of assessments, made an order approving said assessment of benefits, as levied by the Board of Assessors, without change (Rec. 40, 46). Sections 3 and 14 of said Arkansas Statute No. 338 declare that said orders by the County Court shall have the force and effect of a conclusive judgment, and shall not be subject to attack except upon direct appeal.

(b) *Little River Circuit Court.*

In its judgment (Rec. 116) the Circuit Court of Little River County, Arkansas, found that the property of plaintiffs in error "is not inequitably assessed, as compared with the assessment of benefits against other real property in said district; and that said real property of said railway companies will be benefited by reason of said improvement, in accordance with the benefits assessed against it, and in accordance with the cost of said improvement;" that said assessment of benefits on the property of the railroad companies, made by the board of assessors is just and equitable, and that the judgment of the County Court should be affirmed.

In Arkansas the rule prevails that upon appeal the judgment of the trial court is presumed to be correct; and where the Circuit Court sits as a jury upon questions of fact, its findings must be treated the same as a verdict of a jury; and if there is substantial legal sufficiency of testimony to support it, the Arkansas Supreme Court will leave the judgment of the Circuit

Court undisturbed on appeal, and it will be accorded the same degree of conclusiveness as the verdict of a jury.

Gazola v. Savage, 80 Ark. 249.

Crane Co. v. Hempstead, 126 Ark. 590.

The judgment of the Circuit Court approving road improvement assessment must be affirmed by the Arkansas Supreme Court, unless the testimony is not legally sufficient to sustain it.

Mo. Pac. Ry. Co. v. Monroe Co. Rd. Imp. Dist., 137 Ark. 568.

Rogers v. Highway Imp. Dist. 139 Ark. 322.

Patterson v. Rd. Imp. Dist., 219 S. W. (Ark.) 341.

As stated above, there was no testimony before the Circuit Court showing that the railway company could not pay its assessment in this case, or that its property was inequitably and arbitrarily assessed, or would be confiscated. The only testimony on the question of the amount of benefits assessed on the property of plaintiffs in error was that given by witnesses for defendant in error who testified that the assessments were fair and reasonable.

(c) *The Arkansas Supreme Court.*

In its opinion (Rec. 193-4) the Arkansas Supreme Court said:

"This leaves only for consideration the question of correctness and fairness of the assessments. In cases of this character, where the appeal is from a judgment of the Circuit Court, we apply the rule that the judgment will not be disturbed if the evi-

dence is legally sufficient to sustain the findings (citing cases).

"This case was heard on oral evidence adduced by both parties to the controversy, and the testimony is conflicting. That adduced by appellee tends to show that the assessment was fair and uniform. It would serve no useful purpose to discuss the testimony in detail, for we find it to be legally sufficient to sustain the judgment of the Circuit Court."

"We cannot say as a matter of law that benefits from the construction of a given improvement will not accrue to real property in excess of the cost of such improvement. The law does not thus limit the assessment of benefits, but there cannot be a collection of funds in excess of the total cost of the improvement. * * * Benefits are first appraised and then taxes levied, based upon those benefits, to raise funds to carry out the purposes of the organization."

"It is contended that the evidence shows that the benefits were not assessed uniformly in that private property was not assessed in the same proportion as railroad property. The testimony of the assessors shows that they considered all of the elements which entered into the question of benefits or enhancement of values, and we cannot say that appellant has been discriminated against in the assessment of its property, or that fairness of the assessments, as a whole, is not sustained by legally sufficient testimony.

The judgment is, therefore, affirmed."

It is noticeable that the Arkansas Supreme Court did not pass upon the Federal questions alleged by plaintiffs in error to be involved in this case; namely, deprivation of their property without "due process of law"; the denial of the equal protection of the laws, and that the

imposition of said special improvement taxes on their property violates the "inter-state Commerce" clause of the Federal Constitution, although their counsel pressed these three points for decision in his briefs before the court. Also, said court did not decide the assessments invalid because the property of the railroad companies was assessed for benefits on the mileage basis as directed by Section 11 of said Act 338 of Arkansas; neither did the Arkansas Supreme Court declare assessments on property of the railway companies void because the assessors did not assess the improvements on the farm lands separately. Counsel for plaintiffs in error emphasized these points in his briefs in the courts in Arkansas, as he does in his brief in this court, but the Arkansas Courts disregard his contentions and did not pass upon those questions, thereby indicating by non-recognition that his allegations on said matters were without merit.

B. STATEMENT OF THE FACTS OF THE CASE.

Little River County is located in the Southwestern corner of the State of Arkansas, bordering Texas on the south and Oklahoma on the west. It contains 546 square miles, has low, flat, dirt, clay and sandy soils; is bounded on the north and east by a stream named "Little River" and on the south by a larger stream named "Red River," and has a population of 16,200 people, who are engaged in agriculture. It is distinctly a farming coun-

ty, with only thirty or forty per cent of the entire acreage in cultivation. Up to date a total of *nine* special road improvement districts have been organized in said county for the purpose of improving the public roads of said county. Defendant in error is No. 6 of said road improvement districts.

Pursuant to petitions representing a majority in number, in value and in acreage of the land owners, and after proper legal notice by publication, the Little River County Court, on May 14, 1918, by proper order established defendant in error as Road Improvement District No. 6 (Rec. 40). The purpose of the organization of said improvement district was to levy a special tax on all real property situated therein, issue bonds, sell them, and with the proceeds to build a modern gravel highway, with concrete culverts, bridges, etc., over the route of the present dirt public road running from Ashdown, the county seat of Little River County, northward, nearly parallel to the right of way of plaintiffs in error, a distance of five miles to the Town of Wilton; thence due north three miles to the steel bridge at Mills' Ferry on the stream "Little River," where it will connect with a gravel highway now in course of construction, which runs up through the southern end of Sevier County, Arkansas, traversing a fertile black land farming section, connecting the inland towns of BenLomond and Brownstown, which are also located on improved highways now running south from Lockesburg and DeQueen in Sevier County, and running west from Mineral Springs and Nashville in Howard County. The highway, as pro-

posed, will have a lateral running due west from Wilton three miles, thence north one mile (See maps after p. 186 of Record).

The road district is about six by seven miles in size, and contains approximately 24,000 acres of land. The total length of the improved highway, as proposed, is 11.2 miles. Plaintiffs in error have 9.7 miles of main track and 1.68 miles of side track, also station property lying with said district. Under the original formation of the district in May, 1918, its southern boundary extended to the northern corporation limits of the town of Ashtown. Counsel for plaintiffs in error devotes much space in his brief (p. 7) and deplores the fact that no property in Ashdown was assessed. Since this litigation arose the Legislature of Arkansas passed a Special Act, No. 369, approved February 26th, 1920, which validated and confirmed the assessment of benefits imposed on property within said district, and added to said district most of the property in the northern part of said Town of Ashdown.

Ashdown, with a population of 2100, is the southern terminus of the proposed highway. At present it is a center from which will radiate five gravel pike roads, namely those in Road Improvement Districts Nos. 1, 3, 6, 7 and 8, all, already completed or now in course of construction, except the proposed one in District No. 6 in this case, the building of which has been held up for three years because of the war conditions and this litigation. The improvement contemplated in this case is a "local" improvement within the meaning of the Arkan-

sas Statutes, and created under the "Alexander Good Road Law" Act 338 of 1915, and is confined to the territory described. Its purpose is clearly a public purpose. It is designed to furnish better, cheaper and more adequate means of transportation of persons and goods throughout the territory affected, to nearby market towns, and to open up the surrounding territory to settlement by more people, to cause more land to be put into cultivation, and to stimulate the production of larger yields of crops, and to encourage the establishment of more varied industries.

The Board of Assessors divided the farm lands into five zones, according to their proximity to the improved highway. Zone 1 embraced the land lying in a strip one-half mile from the highway, in which the benefits were assessed at \$12.00 per acre. Lands in succeeding zones were assessed as follows: Zone 2, \$10.00 per acre; Zone 3, \$8.00 per acre; Zone 4, \$6.00 per acre, and the last, Zone 5, at \$4.00 per acre (See Zone Map after Rec. p. 186).

The assessors assessed "benefits" on the property of plaintiffs in error to the amount of \$67,900.00. In the judgment of the assessors they believed that during the life of the improvement, and by reason of its construction, the several parcels of property within the district would be enhanced in value or be benefited to the amount of each respective assessment of benefits.

As concerns the property of the plaintiff railway companies, the assessors acting judiciously and with all the physical facts before them, including the valuation

of the railway property at \$270,200.00, as certified by the Arkansas State Tax Commission, in their discretion deemed that the property of the railway companies would be benefited by reason of the construction of the gravel highway proposed; and fixed the "benefits" which will inure to their property during the life time of said improvement at the sum of \$67,900.00. In other words, the assessors decided that twenty years hence, after the bonds shall have matured and been paid and the highway having been in use during said period, the property of plaintiffs in error, will be enhanced in value in the sum of \$67,900.00.

Plaintiffs in error adduced no testimony showing the contrary. All of their testimony was cumulative and addressed to their "main proposition," that their *physical property* would not receive one penny of direct, special benefit; therefore, they should not pay one penny towards the cost of the gravel highway proposed.

A very material fact as to the special importance and value of the improved highway to be built by defendant in error is that it is a final *connecting link* between a system of improved highways traversing Howard and Sevier Counties, running westward and southward, converging at Ben Lomond in Sevier County, then uniting into a single gravel road through the river bottom crossing the stream "Little River" on the steel bridge at Mills' Ferry, then begins the "*connecting link*" of the highway involved in the case at bar, running south to Wilton, thence on south, almost parallel with right of way of plaintiff in error's railway, to Ashdown.

where it intersects with the termini of four other gravel highways already built, and it especially connects with the gravel highway built by Road Improvement District No. 1, of Little River County, referred to in the testimony in this case, which runs south from Ashdown to Ogden, thence extends on to Index at Red River, a gravel road runs out north from Texarkana, Ark-Texas and meets it at Index. On January 1st, 1921, a new steel bridge, costing over \$400,000.00, across Red River at Index, was opened to the public for general highway traffic. It is thus evident that the construction of the improved highway in defendant in error district would complete a network of gravel roads—be the final connecting link—in Southwestern Arkansas, thereby giving an outlet to overland traffic to the people of at least a half a dozen contiguous counties lying in Southwest Arkansas, over the recently opened steel bridge across Red River, into Texarkana, Ark-Texas, the gateway into four States, and the principal market center for said section of Southwestern Arkansas.

C. FEDERAL QUESTIONS INVOLVED IN THIS CASE.

Although counsel for plaintiffs in error pressed upon the Arkansas Courts below the alleged federal questions involved, said lower courts did not refer specifically to said questions, and they declined to pass upon them directly. However, it may be fair to say that the Arkansas Supreme Court in deciding that the assessment

of benefits on property of the railway companies was not inequitable or excessive, by implication held that the 14th Amendment of the U. S. Constitution has not been violated.

As indicated by brief of counsel for plaintiffs in error, he alleges that there are three federal questions involved. Stated from the view-point of the defendant in error, these three federal questions are as follows, to-wit:

1. **Admitting the validity of Act of Arkansas No. 338, 1915, and the validity of the organization of Road Improvement District No. 6 of Little River County under said act, and that plaintiffs in error had notice and a hearing, was the assessment of benefits amounting to \$67,900.00 on their property so plainly arbitrary, grossly excessive, capricious and confiscatory as to deprive said railway companies of their property "without due process of law," in the light of all the facts and the law governing cases like this?**

2. **Admitting the validity of said statute No. 338, and Road District No. 6 validly established thereunder—which validity plaintiffs in error do not attack—were plaintiffs in error denied the "equal protection of the laws," as guaranteed by the 14th Amendment of the Federal Constitution, by having their property assessed for "benefits" clearly unequally, palpably, arbitrarily and plainly inequitably and in an unfair and discriminatory manner**

under the facts of this case and the law governing cases like this?

3. Would the unmistakable effect of the special improvement tax levied on property of plaintiffs in error in this case constitute an unlawful burden on interstate commerce; or does the procedure in this case violate the "interstate commerce clause" (Sec. 8 of Art. 1) of the United States Constitution, under all the facts of the case, and the law governing such cases?

D. BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

I. Meaning of the Term "Benefits."

Counsel for plaintiffs in error, perhaps inadvertently, use the term "benefits" erroneously. He uses the term "benefits" or "assessment" in the same sense as if he meant a direct tax or levy. On page 5 of his brief he says, "The Assessors, endorsed by the Commissioners, are endeavoring to fix a *tax* at the sum of \$7000.00 per mile, making a total *tax* against the property of the plaintiffs in error in that small district, amounting to \$67,900.00, a sum which seems reasonably sufficient to construct a gravel road eleven miles in length." It is a matter of general elementary knowledge that the term "benefits" and a "tax" are entirely different. From the statement quoted it would appear that counsel for plaintiffs in error alleges that they will have to contribute the

total sum of \$67,900.00 as their share of the cost of building the proposed gravel highway. Such is not a fact. The figures "\$67,900.00 Total Benefits" mean that the Board of Assessors endorsed by the Board of Commissioners, and by three courts in Arkansas, including its highest court, deemed, in the light of all the facts, and in the judicious exercise of their discretion and personal knowledge of property of the railway companies involved, based on a residence in said district from 12 to 40 years, that the property of said railway companies lying within the road district, would, during the life time of said improvement, or during the 20 years period of the life of the bonds, at the close of that time, have an "enhanced value," or would receive "benefits" in the sum of \$67,900.00. In other words, the assessors figured that, by reason of the construction of the gravel highway proposed, the property of the railway company now valued, for general taxation purposes, at \$270,220.00 would receive an "increased value" or benefit of \$67,900.00 or an advance of 25 per cent. Assuming that \$270,200.00 represents only 50 per cent of the fair market value of the property, for as mentioned in the record (178) in Arkansas, property is assessed for general purposes of taxation on a fifty per cent basis of its true market value, then the true market value of property of the railway companies is \$540,440.00. Then an assessment of "benefits" of \$67,900.00 on said true valuation would represent an increase in actual value in twenty years of only 12.5 per cent.

In general the term "benefits" means the increased values which will accrue to all property assessed by reason of the construction of the improved highway. "Benefits" and "enhanced values" are synonymous terms in this case. Said "benefits" in respective amounts assessed constitute a new basis or "special valuation" for the levy of a special local tax to defray the cost of the improvement plus all necessary incidental expenses. The cost of a local improvement must never exceed the total ultimate benefits which will accrue to the property. It is logical and equitable that property should pay for an improvement in proportion to the "benefits," or ultimate increased values, it will receive by reason of the improvement. The figures of \$67,900.00 on the property of the railway companies in this case will be used as a "special valuation basis" upon which to levy a rate of tax (Rec. 34, 113) to defray the cost of the improvement. The Arkansas Supreme Court said in its opinion (Rec. 194), "Benefits are first appraised and then taxes levied based upon those benefits to raise funds to carry out the purposes of the organization."

Section 11 of Act 338 under which the road district was organized requires the assessors to compute the "benefits" on any railway property lying within the district; and Sec. 19 provides that the County Court shall levy a tax on said assessed real property to be paid "in proportion of the amount of the assessment of benefits thereon."

The Arkansas Supreme Court has upheld the correctness of using the "benefits" basis of assessment in addition to the instant case.

Patterson v. Road Imp. Dist., 219 S. W. 341.
Wilkinson v. Road Imp. Dist., 141 Ark. 164.

II. The franchise value and personal property of the railway company were not included in the assessment of "benefits" by the assessors in this case.

On page 27 of brief for plaintiff in error, counsel alleges that the franchise value and personal property of the railway company were included in the assessment of "benefits" amounting to \$67,900 on their property.

Counsel does not cite any testimony of assessors to show that they considered or assessed separately the franchise and personal property of the railway companies in fixing the proportion of benefits which would accrue to their property. As this contention of plaintiffs in error was disposed of against their theory by this court in the recent case of *Bush v. Branson*, 251 U. S., 184, 40 Sup. Ct., 113, we do not deem it worth while to notice further.

III. This court will not review purely state questions which plaintiffs in error seek to bring into this case.

Counsel for plaintiffs in error seek to introduce in this record three purely state questions which are not federal questions and have nothing to do with the violation of provisions of the Federal Constitution or the denial

of any right claimed by the railway companies to be guaranteed to them thereunder. These three questions are as follows:

1. The assessment of "benefits" on the property of the railway companies by the mileage basis was correct and valid.

Section 11 of Act 338 of Arkansas, 1915 (p. 1412), provides that "the assessors shall assess the 'benefits' to be received by a railroad on the amount of benefits per mile, and the total amount of benefits assessed against said railroad." In compliance with said statute the assessors fixed the benefits on the railway company's property at \$7000.00 per mile, and multiplying said sum by 9.7, the total of \$67,900.00 was reached.

The Arkansas Supreme Court has repeatedly upheld the assessment of a railroad on a mileage basis, besides the instant case.

Alcorn v. Bliss, 133 Ark. 118.

Mo. Pac. Ry. Co. v. Conway Co. Bridge District, 218 S. W. 189.

Oates v. Drainage District, 135 Ark., 149.

This court, in *Branson v. Bush*, 251 U. S. 184, held that the method of assessing railroad property for taxation on its valuation basis was proper, and was approved by this court in *Cleveland R. R. Co. v. Backus*, 154 U. S. 439.

Counsel for plaintiff in error in the case at bar, devotes much space in his brief, just as counsel did for the railroad company in the *Branson v. Bush* case, that property of plaintiffs in error should be assessed on the

same acreage basis (namely, 130 acres, being the total acreage of their right of way within the road district) as the farm lands adjacent to it. This contention was disposed of against plaintiffs in error in the Bush case, citing Kentucky Tax cases, 115 U. S. 321. In the Bush case this court said, approving the assessment of railroad property on a valuation mileage basis:

"Thus, the assessment complained of was made under valid laws, and in a manner approved and customary in arriving at the value of that part of railroad tracks, situate in the state, county or district."

In *Hancock v. Muskogee*, 250 U. S. 454, this court said:

"It is settled that whether the entire amount or a part only of the cost of a local improvement shall be imposed as a special tax upon the property benefited, and whether the tax shall be distributed upon a consideration of the particular benefit to particular lots or apportioned according to their frontage upon the streets, their market values or their area, is a matter of legislative discretion, subject to judicial relief in actual abuse of power or of substantial error in executing it."

Houck v. Drainage Dist., 239 U. S. 255.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112.

Voight v. Detroit, 184 U. S. 115.

Bauman v. Ross, 167 U. S. 589.

2. The division of farm lands contiguous to the highway into zones, and a graduated assessment of "benefits" thereon was valid. The Arkansas Supreme

Court has approved the division of agricultural lands into zones with a graduated scale of assessment, depending upon the proximity of the respective strips of land to the local improvement.

Hines v. Road Imp. Dist., 224 S. W. 817.

Mo. Pac. R. R. Co. v. Izard County Highway Dist., 220 S. W. 452.

Wilkinson v. Road Imp. Dist., 141 Ark. 164.

Reisinger v. Road Imp. Dist., 220 S. W. 455.

3. There is no proof that the Board of Assessors disregarded the value of improvements on rural lands in fixing the assessment of "benefits" on said lands in their respective zones. Act No. 338 does not require the assessors to value improvements on farm lands, separately, or to include such improvements in levying an assessments of "benefits."

Counsel devotes much space in brief of plaintiffs in error, arguing the untenable proposition that the assessment on the railway property is void, inequitable, etc., because the assessors of the Road District did not include the improvements such as barns, fences, clearings, dwelling houses, etc., in their assessment of "benefits" on the farm lands.

He does not cite any testimony of assessors to show that they wilfully under valued any benefits to farm lands. They testified that all the land within the district was practically of the same character except a difference in improvements (Rec. 172; 174).

Counsel in his brief (Pl. Br. 20) says: "In Section 2 of Act 338 (Acts of 1915, p. 1405) the Legislature of Arkansas expressly required the improvements

of real estate to be assessed." Said Section 2 merely defines the words "land" and "real estate," and does not even contain the word "assessors." The method or procedure which governs the assessors in their work is provided in Section 11 of said Act.

Counsel for plaintiffs in error fails to show how these *purely state questions*, namely (1), dividing farm lands into zones as a method to measure "benefits" accruing to said lands (2) disregarding value of improvements on said lands, even if such act was done, and (3) using the mileage unit as a basis for assessing "benefits" on the railway company's property in strict conformity to the statute, concern any denial of constitutional rights belonging to said railway company, or that they militate against their interests, or that they violate any law or constitution of Arkansas, or contravene any law or constitution of the United States.

Counsel cites no cases of any court of last resort, state or Federal, which hold that either one or all of the above *three purely state questions*, constitute a federal question so as to invoke a review of the same by this court.

An assignment of errors cannot be availed of to import questions into this case for a review by this court which were not alleged to be federal questions, or were not clearly such on their face, and which are not shown by the record to have been raised and passed on by the court below.

Railroad Co. v. Cleveland, 235 U. S. 50.

Railway Co. v. McDonald, 214 U. S. 191.

Marvin v. Trout, 199 U. S. 212.

In *Hagar v. Reclamation District*, 111 U. S. 701, this court said:

"There being no federal question touching these matters, we follow the decision of the state tribunal as to the construction and validity of the statute."

The determination of the taxing district, the kind of property which shall be benefited, the manner of the apportionment of the cost, and how the funds to defray the cost shall be raised are all within the power and discretion of the state legislature.

Walston v. Nexin, 128 U. S. 578.

Mobile Co. v. Kimball, 102 U. S. 691.

Spencer v. Merchant, 125 U. S. 345.

It is only when matters nominally of procedure are actually matters of substance, which affect a federal right, that the decision of the state court, becomes subject to review by the U. S. Supreme Court.

Lee v. Central of Georgia Ry. Co., 40 Sup. Ct. 254.

Decisions of the highest state court, construing local statutes and whether the procedure of organizing local improvement districts under the same is in conformity therewith, are conclusive on the Federal Courts.

Withnell v. Ruecking Const. Co., 249 U. S. 63.

Hancock v. Muskogee, 250 U. S. 454.

As to whether a tax is levied in accordance with a state law, the decision of the highest court of such state is conclusive.

Palace Car Co. v. Pa., 141 U. S. 18.

King v. Portland, 184 U. S. 61.

Willoughby v. Chicago, 235 U. S. 45.

Baltimore Tr. Co. v. Balt. Ry. Co., 151 U. S. 137.

Minn. Iron Wks. v. Kline, 199 U. S. 593.

1V. The property of plaintiffs in error will be benefited by reason of the construction of the proposed highway.

1. Railway property is subject to assessment to help pay cost of constructing a local public improvement where the evidence shows that it will be benefited thereby.

Although the railway companies in this case, in their "Bill of Objections" in the lower courts (Rec. 25, 119, 123) maintained that they were not subject to assessment, and that their property would receive no benefit whatever from the proposed improvement, yet the question has been definitely settled that the property of a railroad company is subject to a special tax to defray the cost of a local public improvement the same as any other real property. The Arkansas Supreme Court has repeatedly so held, and so has this court.

Cleveland Ry. Co. v. Porter, 210 U. S. 178.

Bush v. Branson, 251 U. S. 184.

Bells Gap R. R. Co. v. Pa., 134 U. S. 237.

L. & N. R. R. Co. v. Barber Asphalt Pav. Co.,
197 U. S. 430.

Ill. Cen. R. Co. v. Decatur, 147 U. S. 190.

Oates v. Drainage Dist., 135 Ark. 152.

Mo. Pac. Ry. Co. v. Conway Co. Bridge Dist.,
134 Ark. 292.

Hines v. Rd. Imp. Dist., 224 S. W. 817.

Railroad Co. v. Bridge Dist., 113 Ark. 493.

Rock Is. R. R. v. Rd. Imp. Dist., 137 Ark. 587.

2. **The railway property in this case will be benefited by the construction of the proposed highway as a matter of law.**

It is the settled rule in Arkansas that the Legislature has the power and authority to create local improvement districts for public purposes, and to make a determination of what real property will be benefited. Such legislative determination of benefits is conclusive upon the courts except in a case of plainly demonstrable error or clearly arbitrary abuse of power.

Bush v. Rd. Imp. Dist., 216 S. W. 691.

Mo. Pac. Ry. v. Bridge Dist., 218 S. W. 189.

Burr v. Drainage Dist., 223 S. W. 362.

Alcorn v. Oak Co., 133 Ark. 118.

Moore v. Levee Dist., 98 Ark. 113.

Davies v. Drainage Dist., 112 Ark. 357.

Hill v. Echols, 140 Ark. 474.

This court in *Bush v. Branson*, 251 U. S. 184, cited with approval from the leading case of *Spencer v. Merchant*, 125 U. S. 345, where it was held if the proposed improvement is one which the state has authority to make and pay for the legislature has the power to determine, by the statute imposing the tax, what lands, either in kind or acreage, will be benefited by the improvement, and what proportion of the assessment such benefited lands should pay, and if it does so, its determination is conclusive upon the owners and the courts.

It is also settled that the legislature has power to delegate or commit the ascertainment of the fact of what property will be benefited and to what extent the bene-

fit will accrue, to local boards of assessors or commissioners.

Wagner v. Baltimore, 239 U. S. 207.

Houck v. L. R. Drain Dist. 239 U. S. 254.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112.

Bauman v. Ross, 167 U. S. 548.

Davidson v. New Orleans, 96 U. S. 97.

The Arkansas Legislature in Sections 2 and 38 of said Act 338 (Acts of Arkansas, 1915, p. 1400) by declaring that railroads and their rights of way shall be deemed "real property," within the meaning of the act; and in Section 11, by requiring the assessors to assess the amount of benefits per mile to be assessed on any railroad lying within any road improvement district organized under the act, determined that railroad property lying within the road district would be benefited as a result of the construction of the improved highway therein. Therefore, by such legislative determination, it is clear that the property of plaintiffs in error will be benefited by building the improved highway, as a *matter of law*, or a legally determined fact.

3. **A review of the evidence shows that the property of plaintiffs in error will be benefited by reason of the construction of the proposed highway, as a matter of fact.**

A. WITNESSES FOR PLAINTIFFS IN ERROR.

(1) *QUALIFICATION OF WITNESSES AND GENERAL CHARACTER OF THEIR TESTIMONY.*

The attention of the court is called to the fact that all of the witnesses for plaintiffs in error are their em-

ployees with periods of service ranging from two to fifteen years with said railway companies. Not one of them testified that he had ever lived in Little River County or within the limits of the road improvement district. All of them lived in other states. They were familiar only *in a general way* with the lands within the road district, and they seemed to know the route of the proposed highway mostly from the blue print maps in evidence. None testified that he had ever been a farmer or business man within the county or road district or knew of the value of farm lands or the value of farm produce grown therein, or how the value of said farm lands had been affected by the construction of gravel roads already built in the county. Not one of them was a railroad traffic man, nor did they give any statistics as to the passenger and freight traffic at stations within said road district. One was a tax commissioner, residence not given (Rec. 129); another a Chief Engineer from Kansas City, Mo. (Rec. 143); another a Civil Engineer, residence not given (Rec. 149); another a general superintendent of transportation, domicile not stated (Rec. 151); another a superintendent of bridge and building and water service, residence not given (Rec. 152); and another a road master of Texarkana. It is significant that no traffic manager, rate clerk, fiscal agent, immigration agent, auditor, treasurer or any railway man who would know the volume of traffic handled by the railroad and its financial ability or inability to pay the special tax levied upon its property, was called to testify.

A casual reading of the testimony presented by the witnesses for the railway companies will plainly reveal that every one of them "with one accord in one place" stated on direct examination that the railroad property would *not* be benefited in any direct special or peculiar manner by reason of the improved highway. It is clear from the questions and answers that they had in mind the narrow, limited idea of a direct, tangible, visible benefit to the *physical* property, such as the railroad tracks, road bed, buildings and the bare land as such, called the right of way. Yet, all of said witnesses admitted that a gravel road was a desirable betterment for a community, would tend to open and develop farm lands, cause more commerce to be transported, and thereby be an indirect benefit to the railroad company; that the railroad property would reap its share of the general community benefit and prosperity, which usually follow the building of improved highways.

Their testimony on the question of "benefits" is concentrated and cumulative on their main contention that *absolutely no benefit whatever* would accrue to the railroad property. Not a one of them gave it as his opinion that the total assessment of "benefits" amounting to \$67,900.00 was too high or too low, arbitrary or fair; confiscatory or reasonable. There is *not one word* of proof adduced by the railway company on the question of the correctness or justness of the proportion of benefits assessed on its property.

(2) TESTIMONY OF WITNESSES:

(a) E. PHELPS (Rec. 129):

Direct Examination.

He has been tax commissioner for the Kansas City Southern Railway Company for over two years; has given subject of benefits accruing to railways arising from construction of highways, special study. Is familiar with Road Improvement District No. 6 and states it contains $9\frac{3}{4}$ miles of main track and 1.67 miles of side track. He does not know how property other than right of way is assessed (Rec. 131). He believes the record shows an assessment of \$7000.00 benefits per mile on main track, but cannot give figures on the side track. He does not believe the property of the railway companies "would be in any manner benefited by the construction of the road." He understands the term "benefit" not what we might call a "community benefit" but a benefit which is special, local and peculiar to the property in question, and that for the railway companies to be benefited, it would have to be a benefit which would add to the market value of the railway, and he did not believe any improvement of the nature contemplated would constitute an addition to the market value of the property and there would be absolutely no benefit to the company's property (Rec. 131).

Cross Examination.

Witness is familiar in a general way with the gravel road in District No. 1 running south from Ashdown. He knows nothing about the other gravel roads extend-

ing from Ashdown west to Richmond and Pine Prairie; that he considers the railroad derives no benefit whatever from the construction of the gravel pike which has already been constructed along the railroad from Ashdown to Ogden; that he believes the construction of an improved highway *enhances the value* of private property contiguous to the highway. Opinion is railroad would share in such benefit as might be described as community benefit.

"I think the railroad would be indirectly benefited by anything which benefits the community through which it runs, but merely in a community sense, and not benefited in a way which would be special and directly peculiar to the railroad property itself" (Rec. 132-3). "I do not think any one who ever thought seriously on the subject, would dispute the proposition that an improved, modern highway will improve and increase the value of real estate and farm lands immediately in the vicinity where the highway is built." Such benefits are of advantage to the owner in several ways, such as a higher selling value, an increased rental value, or a reduction of transportation expense in marketing his products. Such owner of private land cannot be deprived of benefits of that kind which come to him. It is different in case of a railroad whose right of way is not for sale, and whose prosperity and earnings to a certain extent depend upon conditions extraneous to the property of the people along the line of highway. The principal thing is the benefit accruing to the private landowner is tangible and can be reduced to possession, while

the benefit accruing to a railroad is problematical and speculation and cannot be reduced to possession. The railroad company depends upon making an income off of commodities and passengers which come from the territory it traverses and connecting territory. "Q. Do you mean to tell the court that when such a public improvement is constructed as a highway, which will produce and give greater facilities for transportation of commodities, in the reaching of markets, and in increasing the value of lands and other improvements thereon—facility in transportation of persons and commodities to the markets of the country from which market the railroad in turn transports them to other parts of the country, will not benefit the railroad?" "A. That is just exactly what I mean to tell the court." Yet he did not mean to say that the railroad is wholly independent of the territory it traverses. His duties carry him over the Kansas City Southern Railway (plaintiff in error) in Missouri and Kansas, where they have improved highways, and where said railway "receives a general benefit, a community benefit" (Rec. 135). He believes a railroad should be free from any taxes for special highway districts. Has only a general knowledge of the territory which the proposed highway traverses, and the channels of trade of the different communities which it will communicate with, and has a general knowledge of the characteristics of the northern part of the district and in the south end of Sevier County. Has never traveled in that section and is not familiar, from personal observation, with the rich agricultural

region that this road taps, and the population to which it will give transportation facilities in southern Sevier County, to points on his railroad. He thinks an improved road would open up the country to settlement, cultivate more land and induce farmers and other people to locate in that vicinity, and "the increased taxes would be off set by the reduction in transportation" cost (Rec. 136-7).

Comments on Phelps's Testimony.

. Viewing the testimony of this witness in its most favorable light, we see that he is a strong partisan for his employer, and that his "expert knowledge" is chiefly theoretical and academic, based on only "general information" about the lands and improved highway proposed and not from "personal observation." He has not traveled over the district, except on the train. He must have ridden in the observation car." He lives in another state. He is not a traffic expert. It is significant to note how many times he admits lack of information sufficient to answer questions of counsel. He admits that there are two kinds of "benefits," namely, (1) direct or special, and (2), indirect or community. He denies that the railroad property will receive a direct benefit but admits candidly and correctly that his railroad company will share in the community benefits. He fails to show that a "community benefit" is not real and tangible, and has no legal cognizance. He does not deny that though problematical and speculative, in a sense such benefits have a legal value, even if they cannot be

calculated accurately in dollars and cents. On page 134 of the record he says that the prosperity of a railroad depends upon conditions extraneous to the property of people living along the line, yet on the opposite page he reverses his opinion on said proposition. He thinks a railroad should pay no special improvement taxes at all (Rec. 136: 138). Such an opinion has little weight in the face of many decisions of the highest courts to the contrary. Although the tax commissioner, he is uncertain about the valuation of the railroad for purposes of general taxation. He says \$33000.00 per mile; the record shows \$27,000.00. He says there are 28,100 acres within the district; his engineer says 23,185 (Rec. 136, 139, 149).

The weight of his testimony for plaintiffs in error is worth nothing except his opinion that the construction of the proposed highway would be no direct, peculiar and special benefit to the bare physical property of the railroad company. He does not deny that the railroad company's traffic would increase and thereby increase its earnings after the highway was built. He made a strong argument for good roads in support of the theory of the witnesses for the defendant in error. His "five points" are clear and convincing to any "doubting Thomas" of the value of an improved highway to a community. They follow:

1. It will increase land values.
2. Enhance rental values.
3. Reduce expense of transportation.

4. Opens up country for settlement and induces increase in population.

5. More land will be cultivated (Rec. 134; 137).

If he had followed the argument a little further he would have admitted that the more people in a community and the more land cultivated the more commerce the railroad will haul out and in, and the greater its volume of traffic, the more it earns. Then its property increases in value and he could have seen a "benefit" to the railway owner, just as tangible as the benefit to the private land owner; and admitted that the improved highway was the cause of it all.

(b) J. H. WILLIAMS (Rec. 139):

This witness, as Circuit Clerk and custodian of records of the road district, testified to the amount of valuation of the property within the district for purposes of general taxation, and to the amount of "benefits" assessed (Rec. 140-2). See tables post *infra*, p. 77.

(c) J. M. WEIR:

Direct Examination.

Been in the employ of plaintiffs in error two years. Is familiar with the territory in question; has seen a map of the district. In his opinion construction of the improved highway proposed would not be a benefit to the railway property; "in fact, it would be rather a detriment" (Rec. 143).

Cross Examination.

Witness objects to building of the highway opening up a transportation route for inhabitants' territory affected, because the effect of it to a certain extent would be that his railroad would not get some business. Highways are a detriment to a railroad to the extent they cause competition. Construction of that part of the highway extending west and north from Wilton which would enable people in that territory to reach the railroad possibly would not be a detriment to the railroad. Cannot say that the construction of the road proposed, which connects at Ashdown with gravel road running to Ogden, thence with gravel road on to Red River and into Texarkana; then on the north end of this district No. 6 which connects with road in District No. 1 in Sevier County, already constructed and running entire length of Sevier County would be any betterment to his road. Knows that this proposed road is a link of a chain of roads of a north and south highway, which is being constructed through Western Arkansas (Rec. 144-5).

He understand a "benefit" to be something that can be sold and bought and increases in value. He cannot see where there would be any increased value to the property no matter what the roads were. "There would be some *financial* benefit in the way of increased revenue if all the roads were in excellent shaps and we were the only road they could get to." Presumes his railroad (KCS RY) hauls out of Ashdown, freight and passengers which the other railroads, the Frisco and the Memphis Dallas & Gulf bring in (Rec. 146). Is afraid that

if territory in south end of Sevier County and west of Wilton in Little River County were opened up, people might haul goods to Ashdown and let the Frisco ship it away. Motor trucks haul stuff to the railroad as well as they haul it away (Rec. 148).

Re-Direct Examination.

Motor trucks carry goods on highways in competition with the railroads.

Basis of his objection and his testimony is "when they take our property to build up a competing line to us, we object?" A. "Yes, sir." (Rec. 147)

Comments on Weir's Testimony.

Witness lives in Kansas City, Mo. Is not a traffic man or fiscal officer of the railroad. Has been chief engineer in its employ for a short period of two or three years. Does not state that he has ever lived in Little River County, Arkansas. Says it has been part of his duties to study the matter of improvement districts as to whether the construction of roads along the railroad improve its property. He does not tell where and how long or what methods he used in such investigation, whether a general observation or a scientific, economic analysis. He holds the erroneous opinion that a "benefit" can only be tangible, and such as would increase the selling value of the property (Rec. 143, 146) which Mr. Phelps said had no market or selling value (Rec. 134); and that the main effect of the building of an improved highway is a detriment because competition would spring up.

The Arkansas Supreme Court, in *St. L. & S. F. R. R. Co. v. Bridge District*, 113 Ark., 493, held that railroad property could be assessed benefits to pay part of the cost of building a highway traffic bridge between Fort Smith and Van Buren, Arkansas, although competition for the railroad company would result

We submit that the opinion of the witness on that point is too limited, and is contradicted by well known facts and court decisions. He speaks of two other competing railroads, the Frisco and the MD & G, which intersect the plaintiff in error at Ashdown (Rec. 144). He does not explain to what extent said roads are competitors. He is not a traffic man, and does not know of his own knowledge about the exchange of traffic by the three railroads at Ashdown, either as to character or amount (Rec. 146). He does not explain that his railroad, the Kansas City Southern, is the only trunk line through Ashdown, while the Frisco is only a branch of its main system, and the MD & G a small, weak road, of the uncomplimentary "jerk water" type, which uses the terminal facilities of the KCS. Therefore, neither of said other roads is a strong competitor of plaintiffs' in error through trunk line from Kansas City, Missouri to the Gulf of Mexico. He admits that the other two railroads are "Feeders" to his line, as well as competitors, in that his line hauls away stuff brought in by the other two railroads (Rec. 146). His spirit of jealousy of competing railroads at Ashdown is evident (Rec. 144; 147-8), as is his lack of specific knowledge and evasive replies (Rec. 145). He admits the construction of the

proposed highway would bring financial benefit in the way of increased revenue to his railroad (Rec. 146), and that the good highways enable maybe 50-motor trucks to haul lumber and other materials to his road to be shipped over it to market. Therefore, such auto truck lines are "feeders" (Rec. 148).

(d) A. LECKIE:

Direct Examination (Rec. 149).

Civil engineer by profession. Has given the subject of whether or not the construction of a dirt road like the one proposed would be a benefit to the property of the railroad company quite a little thought. It would not benefit the property directly.

Cross Examination.

Has not examined the plans and specifications of the proposed highway, as prepared by the Arkansas State Highway Commission and the Parkes Engineering Company, and knows nothing about their plans for drainage. Secured his knowledge of the acreage within the district from the map (Rec. 150-1).

COMMENTS:

The above witness is a civil engineer, in the employ of plaintiffs in error. His residence is not given. No proof to show that he has ever lived in the county or road district affected. He is not a traffic expert. He says there would be no direct special benefit to the physical property of the railroad. He does not deny that there would be greater amount of traffic for the railroad

to transport if the highway were built. He has charge of maintenance of track, and does not testify as to any fiscal or traffic affairs of the railway company. He knows nothing about the plans for drainage of some ponds west of the right of way (150). He cannot say that the construction of the proposed highway would benefit the railway property from the stand point of better drainage of their right of way because he does not know the plans and specifications. We submit that the only value of this witness' testimony is that he gave an estimate from the map of the number of acres within the road district.

(e) E. E. HOLDEN:

Direct Examination.

He is General Superintendent of Transportation; understands "In a general way" about this improvement district. His opinion that construction of proposed dirt road will not be of any benefit to property of plaintiffs in error (Rec. 151).

Cross Examination.

Des not think construction of gravel road in District No. 1 in Sevier County benefits the railway company. Thinks there is more or less traffic passing over it than in the past. Is not acquainted with cost of the road (Rec. 152).

COMMENTS:

At the time of the testimony this witness was Superintendent of Transportation of *eight* different railroads.

He certainly could not know the detail facts of the road improvement project in question. His residence is not given. No testimony that he ever lived in Little River County, Arkansas. He knows about this road improvement district only "*in a general way*," and he knows nothing about what part of the cost his railway company paid towards the cost of building the gravel highway parallel to his railroad in Road Improvement District No. 1, in Sevier County, immediately to the north of the County of Little River, in which defendant in error is located. He has never been a traffic manager or a fiscal agent. He does not state how long he has been in the employ of the plaintiffs in error. He denies that the construction of the gravel road proposed in this case would benefit the bare physical property of the railway company, but he gives no opinion upon the indirect, yet certain, benefit which would accrue in the way of larger volume of traffic, increased earnings, etc. He does not say that he has ever given the question of taxation, railway finance and "benefits" from local public improvement any special, scientific study. We submit that his evidence is not probative on any point.

(f) J. J. TAYLOR:

Direct Examination.

He is Superintendent of Bridge and Building and Water Service; is familiar with the railroad and location of proposed road in Little River County; has seen the map. In his opinion, from his experience as a railroad man, the construction of the road would not benefit the property of the railway company (Rec. 153)

Cross Examination.

His opinion is based upon his experience as a railroad man. Improved roads enhance the value of real estate. Such enhancement is an appreciable one, that can be determined and figured. Does not think enhancement of farm lands in value, with increased transportation facilities on that land, enhances the value of railroad property in that vicinity. His railroad company maintains an immigration department for the purpose of undertaking to settle up and improve the territory it traverses. It helps the betterment and improvement of the country that much and they like to see it done, and indirectly, it is a benefit to the railroad, the improvement of the country, but it is more than off-set by what it loses. Does not know of any improvement of dirt public road running to Arden, etc. Is "not familiar with anything except along the track; have not been out to see it" (Rec. 154).

COMMENTS:

Residence of this witness is not given. Nothing to show he ever lived in Little River County, Arkansas. He was Superintendent of Bridge & Building and Water Service for four lines. He had been in said work for fifteen years. Had never been a traffic manager, or connected with the finance department of the plaintiffs in error. His opinion is that the physical property of the railway company will not be benefited by building the gravel road. He admits that an improved highway causes the values of real estate to increase, and that such

improvement of the country will be an indirect benefit to the railway company; that plaintiffs in error maintain an immigration department for the purpose of inducing new settlers to move in and open up lands adjacent to its line (Rec. 154). He says such indirect benefit is more than off-set by what the railway company loses, but he does not explain "what it loses" or how much, or why. He does not know of any improved highway running west from the proposed road in this road district to Arden, thence to Foreman. He is only familiar with conditions *along the railroad track* of plaintiffs in error. He, too, has been a passenger in the "observation car."

(g) J. J. HANCOCK:

Direct Examination.

He is an employee of plaintiffs in error as road master. Jurisdiction includes line of railroad through Little River County, Arkansas. Is familiar with line through road improvement district. In his opinion, the construction of the dirt road as shown on the map "Exhibit 2" would not be any benefit in a direct way to the property of the railway company (Rec. 155).

Cross Examination.

Does not know of the character of the proposed construction. Has not examined the specifications as compiled by the highway department and the district. Does not think that the railroad will be benefited at all.

Q. "Would the obligation of the Town of Wilton benefit the railroad?"

A. "It might."

The construction of the road would be a benefit to the people who reside in the territory (Rec. 156). The improvement of the community along the line of railroad and the territory that lies along the line from which it gets its commodities and passengers benefits the railroad. The railroad depends upon the territory it traverses to a certain extent for commodities and passengers it transports in order to get revenue. Does not see that it would benefit the plaintiff in error if modern highways are erected into the towns of Ashdown and Wilton that bring increased transportation of products into these towns. Does not know that commissioners have been negotiating with his road for rates to haul gravel from Horatio. Does not know of gravel beds in Little River County (Rec 157-8).

COMMENTS:

This witness lives at Texarkana, 25 miles from location of the proposed gravel road. He is road master for the railway company, engaged in overseeing ordinary construction and maintenance or highway work, no proof that he is a traffic man or is learned in railway economics. He says that the bare physical property of the railway company would receive no direct benefit yet admits that the improvement of adjacent communities to the railroad would benefit the railroad, which is a matter of common knowledge,

This court said in *Branson v. Bush*, *supra*:

"To this must be added the obvious fact that anything which develops the territory which a

railroad serves, must necessarily be of benefit to it, and that no agency for *such development equals that of good roads.*"

This witness has never seen the plans and specifications prepared by the engineers for the gravel road. He thinks that the obliteration of the Town of Wilton might benefit the railroad. His obvious lack of knowledge of conditions in Little River County is shown by his answers: "I do not know" to questions about the gravel road and contiguous lands from Ashdown to Ogden; and about gravel beds (Rec. 157-8). We submit that some of his replies are wise, and some are "other-wise," and that his testimony fails to qualify him as an "expert witness" upon the subject for which he was offered; namely, does a railroad company receive benefits from the construction of an adjacent local improvement?

B—TESTIMONY OF WITNESSES FOR DEFENDANTS IN ERROR.

1. RESUME OF TESTIMONY ON QUESTION OF BENEFITS TO PROPERTY OF RAILWAY COMPANY.

(a) JOEL MILLS:

One of the commissioners in road district; has lived in Little River County all his life; 43 years. Is familiar with practically all of the lands within the district. Is familiar with the assessment of benefits as made by the assessors on the lands and the railroad. His observation has been that benefits accruing to a district like this

by reason of good roads would get just as much good or benefit in five years as it ordinarily would in twenty-five without this road improvement or means of transportation. Territory opened up to points on the Kansas City Southern by reason of this road being constructed would be the connection at Ashdown with Road District No. 1, then the road leading out of Wilton connects at the steel bridge at Mills Ferry where there is a lot of valuable territory which until we built the steel bridge, seven years ago, was virtually annihilated for many months in the year on account of being impossible for them to travel through the bottoms of Little River. The territory which will be connected with the Kansas City Southern Railway is a big lot of farming land in the south end of Sevier County has no certain facilities for getting anywhere except to Wilton; if they could get to the steel bridge on Little River they could travel this way most any time of the year, but otherwise, particularly in the winter months, they are shut off. It will bring trade in the south end of Sevier County across to this territory. The principal part of those people do their trading and banking business at Ashdown and Wilton. More territory to be developed on the lateral road running west of Wilton than on the other. A rich farming country in there and the way it is now there is just a farm here and there and this road through there will build it up.

Improved highways practically put every piece of land in the territory in cultivation; put settlers on it and put the land to producing something and brings new

people into the country to develop the land. The Kansas City Southern Railway Company will be benefited by reason of these things mentioned as it is a trunk line bringing practically all the products that come in here, and also taking away practically all those that are shipped out. Cattle, lumber, hay, corn, cattle and hogs are raised in the immediate vicinity of Wilton and shipped out over the Kansas City Southern Railway Company's line (Rec. 158-61).

Cross Examination.

Soil is productive bottom land on both sides of Little River, about 50% of the land being in cultivation in the whole district. Land in the district is worth from \$20.00 per acre up, on the market, without the improved highway. Would be worth \$30.00 with it. It would sell for 50% more (Rec. 162-4). Country is generally built up and generally good improvements come because good roads bring other people in and settle up the land; bring money, buy the land and put it in cultivation. There is much corn, cotton, hogs and other things raised on the north side of the river in Sevier County. If the road is built the land owners will have a better highway over which to take their produce to market, which will necessarily increase the value of their land. The majority of the transported stuff from inland, around Mills Ferry, stops at Wilton (Rec. 165). As far east as Ben Lomond and Brownstown, in Sevier County, they haul their cotton east across into Howard County. The construction of the gravel road contemplated would bring a lot of this cotton and produce this way. The land lo-

cated in Sevier County will be largely benefited by the construction of this road as it would give them a market and outlet.

There is a proposed Road Improvement District in Sevier County, to connect with defendant in error at the steel bridge, at Mills Ferry. Defendant in error district No. 6 connects at Ashdown with District No. 1. It is proposed to connect No. 6 with Road District No. 1 in Sevier County, which has a gravel road running north and south through the entire county. Defendant in error district is to form a part of a general highway north and south through the western part of Arkansas, what is called the Bankhead Highway, or a through general highway (Rec. 167-8).

(b) L. G. FERRELL:

Direct Examination (Rec. 169).

Lives at DeQueen, in Sevier County, Arkansas, 35 miles north of Ashdown, and has lived there for nine and one-half years. Is secretary of abstract company; has had experience in dealing with lands in that county. Is acquainted with the lands in Little River County; has been assessor in three road improvement districts in Sevier County. After construction of improved highway in Road District No. 1, in Sevier County, the value of land therein increased 25% the first year; then another 25% from two to five years, and another 50% after that. That increase inures to the benefit of the Kansas City Southern Railway Company, whose line, 26 miles long, traverses the district. Gravel road is prac-

tically with the railroad from south side to north side of Sevier County (Rec. 170).

Cross Examination.

Improved highway proposed would draw trade to Ashdown from about 50,000 acres that is not being drawn now (Rec. 171).

(c) DR. A. N. WOOD:

Direct Examination.

Has lived twenty-six years in Ashdown, Little River County, Arkansas. Is one of the assessors in defendant in error, Road District No. 6; was commissioner in District No. 1, in which three *gravel roads* run out of Ashdown. Since the construction of those gravel roads there has been from 50 to 100% increase in the value of lands. The nearer the road, the greater the increase. He bases his statement upon the actual sale of lands that have come under his observation. The character of the lands in District No. 1 is practically the same as that of the lands in District No. 6. He is familiar with the lands in District No. 6. In assessing the farm lands they used the official plat of the district made by the Board of Assessors and the District Engineers (see Exhibit 1, Zone map after p. 186 of the record). Divided the land into five zones, on which they assessed "benefits": Zone 1 within one-half mile of gravel road, at \$12.00 per acre; Zone 2, within 1 mile, at \$10.00 per acre; Zone 3, within one and a half miles, at \$8.00 per acre; Zone 4, within one and a half to two miles, at \$6.00 per acre; Zone 5, at \$4.00 per acre (Rec. 172-3).

As to benefits which will inure to the plaintiff in error by reason of the improvement, it will settle up the country, cause more products to be raised and shipped out and more to be shipped in; will open up territory that can only come to this railroad and which at certain seasons of the year cannot now get here. North of Wilton, three miles to the Sevier County line, there are a couple of creeks which are pretty bad to cross, and the bottom in the winter time gets mighty bad; there is good farming country in north and east of the river, around BenLomond and Brownstown, inland towns, and this road will help draw the trade from that territory to Wilton and to Ashdown. With reference to the territory west and northwest of Wilton, into which the lateral extends, this road will open up that country in there around Arden and Allene, and bring trade to Wilton, a part of which now goes to Arden on the Frisco. Before the road in District No. 1 was built, the majority of farmers down the river (Red River) traded at Fulton, in Hempstead County, on the Iron Mountain Railroad, because after they got to Ogden they still had eight miles of bad road to Ashdown. Now, since they have a good road to Ashdown, at least 75% of them trade at Ashdown by reason of the improved road. He believes a similar condition would exist in Road District No. 6, and it would open up a very fine country across Little River, in the black land region around BenLomond and Brownstown, about the best anywhere around here (Rec. 174-5).

Cross Examination.

By "benefits" witness means the development or good that will come to the country. Three miles of bad road south of the river will be eliminated. The highway will benefit the railroad. The Kansas City Southern will get more goods to bring in and to carry away. The railroad is taxed because it will *get a benefit* by the increased business. If a railroad companies' business is increased it makes their right of way and railroad property in the district more valuable; is a benefit to their business and makes the railroad more valuable by doing more business thus receiving more income from it (Rec. 176-7).

(d) A. D. DuLANEY (Rec. 178):

Is attorney for the defendant in error; gave figures relative to assessment valuation and assessment of "benefits" of property within the Road Improvement District No. 6. (These statistics are used in tables post *infra* (see pp. 77-8).)

(e) DR. C. E. MAY:

Direct Examination.

Has lived at Ashdown, Little Rock County, Arkansas for 12 years; has been assessor in four road improvement districts in said county, namely: Nos. 1, 2, 3 and 6. Is one of the assessors in defendant in error. Is familiar with the lands in all four districts. Lands in No. 6 are similar to those in No. 1. By reason of the construction of the road the property will be benefited

in dollars and cents in the increased valuation of the property and by reason of improved transportation facilities. Lands will increase in value as much as assessed in benefits in proportion in which we have assessed the different zones. Witness thinks a benefit of \$67,900.00 will inure to the Kansas City Southern by reason of the improved highway during the life of the bonds, and in fact as long as the road stays there. The road will bring increased production, increased transportation facilities and increased valuation. The "benefit" accrues to the railroad as well as to the other property in the district. *It would earn a certain per cent on increased business.* "If the railroad wasn't earning but 3% without the improvement and with the improvement earned 25% I think it would certainly be a benefit to it" (Rec. 179-81).

Cross Examination.

Witness assessed railroad because he thought it would get increased business if this highway were built. Because of more stuff to haul in and out and a general development of the country. He thinks the land will be worth on the market, after the road is built, the amount of the benefit assessed per acre as increased value (Rec. 181-2).

(f) P. S. KINSWORTHY:

Direct Examination.

Has lived at Wilton in defendant in error district for 25 years. Is one of the Commissioners in this district and is familiar with all the property in the district, the specifications, route of road. In his opinion, the

real property will increase within the district, in value, 100% within a period of three or four years by reason of the improvement. Building of the proposed road will open up the west country in about Arden and also in Sevier County, across the river, and will give a connecting link with a gravel road running north and south (Rec. 182-3). The same benefit which inures to lands by development of the country, more crops raised, better transportation facilities, producing more business on the land also produces more business for the railroad. *The amount of business done by a railroad, like any other business—even farming—determines the value of the property operated.* If it didn't they wouldn't build railroads (Rec. 185).

Cross Examination.

A good deal—50% of products raised near the west extension of the road, goes to Foreman (on the Frisco R. R.), 16 miles from Wilton. The country is wet and flat. We propose to build this road through that wet country and draw the trade to Wilton, away from Arden on the Frisco. Witness thinks the construction of the lateral road proposed for three miles west of Wilton will draw considerable trade that now goes to Foreman (Rec. 183-5).

2. COMMENTS ON EVIDENCE OF WITNESSES FOR DEFENDANT IN ERROR.

(a) *Qualifications of the witnesses:*

Although the witnesses for the road district do not claim to be expert in the matter of benefits accruing to a

railway company by reason of the construction of a gravel highway in the territory traversed by the railroad, we submit that our witnesses knew what they were talking about.

Mills (Rec. 158), a well-to-do, prosperous farmer and merchant, has lived in Little River County all his life—for seventeen years at Wilton—and has known the property of plaintiff in error ever since it was begun. He knows all the lands in Little River County, and is familiar with the lands in Sevier County. He has made observation and has actual knowledge of the increased value of lands in road improvement districts in both counties. He knows the territory which will be opened up by the highway and how the Kansas City Southern Railway, being the only main line or trunk line of railroad passing through Little River County, will reap the largest share of benefit (Rec. 160). His opinion, based upon his knowledge of conditions and the changed situations in other road improvement districts, is that there will be as great development in five years with the improved highway as in twenty-five without it. Mills is one of the commissioners in this road district. A casual perusal of his testimony reveals that he is a fine business man, of sound judgment, with intelligence above the average of a small-town merchant-farmer, has broad and clear information about the lands and other property in the territory in question, and that he knew what he was talking about.

FERRELL (Rec. 169) is the only witness we called who does not reside in Little River County. He

lives in Sevier County, which borders Little River County on the north. Having been in the abstract business for years, and an assessor in *three* road improvement districts in Sevier County, in one of which (No. 1) the plaintiff in error has 26 miles of track, and being acquainted with the lands and property of the railway company lying within this road district, he was a well qualified witness.

DR. WOOD (Rec. 172), a former practicing physician, now a farmer and merchant; has lived at Ashdown, in said road district, for 26 years. He was Commissioner in Road District No. 1, and is assessor in this district, No. 6. He has actual knowledge of the increase in value of lands in other improvement districts in Little River County; and how additional farm produce was turned from the southeastern part of the county where it had been going to the Missouri Pacific Railroad, back to Ogden and Ashdown, to the plaintiff in error, as a result of building a gravel pike in Road District No. 1, from Ashdown south to Ogden, eight miles. His responses to questions of counsel reveal his thorough knowledge of local road conditions, markets, land values and railroads within Little River County and Sevier County, and considering his business success, keen intelligence and long years of residence in this district, we submit that he fully knew what he was talking about.

DR. MAY (Rec. 179), a practicing dentist and farmer; had lived within this road district No. 6 for twelve years, and has been assessor in *four* road im-

provement districts, including No. 6. His testimony shows that he is a man of splendid intelligence, knows the property affected in this district, what benefit other gravel roads have been to the people and to the railroads in the county, so we submit that he was a well qualified witness.

KINSWORTHY (Rec. 182), is a well-to-do merchant-farmer, and has lived in Little River and Sevier Counties all his life, except four years. Has lived at Wilton in this road district for 25 years. Has known plaintiff in error ever since its first whistle sounded in this county, and is familiar with the lands in Little River and Sevier Counties. His evidence discloses that he knows what he is talking about.

(b) *Points established by evidence of witnesses for the Road District.*

1. They are familiar with all property lying within the road district, and have definite, well-founded opinions as to the fact and the extent of "benefits" which will inure to said property by reason of the construction of the proposed improved highway.

2. They are officers of the district, have had previous experience in such work, resided in the district for many years, have actual knowledge of matters and have had opportunity to see and know the facts and opinions which they give.

3. Very fertile farming territory and inland towns, now shut off by bad river, creek and flat land roads from markets on the Kansas City Southern Railway,

lying in southern Sevier County and Western and Northern Little River County, will be opened up and developed and given an outlet by the proposed new highway.

4. Many people will be brought in, increased land values, larger crops, more tonnage, freight and passengers, more revenue and more earnings, for the railroad will result from the new highway.

5. The railway company will be benefited by reason of the construction of the proposed new highway.

6. The plaintiff in error is the only trunk line railroad passing through the territory affected.

7. About 50 per cent of the land within the district is in cultivation. The proposed highway would increase land values 50 to 100 per cent.

8. Proposed highway will be a connecting link between highway in western Arkansas, running south from Polk County and west from Howard County; thence through Sevier County, connecting with this proposed highway at steel bridge at Mills Ferry on Little River; thence over this highway to Wilton; thence to Ashdown, where it connects with highway already built south to Ogden; thence to steel bridge (recently opened) at Index on Red River; thence over a highway into Texarkana (Tr. 167-8).

9. Some trade from BenLomond and Brownstown, in Sevier County, which now goes eastward to markets in Howard County on other railroads, and trade in western Little River County which now goes to Arden and Foreman on the Frisco Railroad, will be turned to Wilton and Ashdown on line of plaintiff in error.

10. Witnesses deem assessment of "benefits" of \$67,900.00 on property of plaintiffs in error fair and equitable (Rec. 159-171).

11. Highway will be 11.2 miles long. Bonds to amount of \$90,000.00 planned to be sold and state and federal aid in addition. Bonds to mature in twenty years.

12. Assessment of "benefits" on the property of plaintiffs in error were not arbitrarily made. Assessors had zone map of district before them, also the tax books showing the assessed valuation of all property for purposes of general taxation (Rec. 173). No effort was made to discriminate unfairly against the railroad company. Dr. Wood, one of the assessors, said, relative to the amount of benefits assessed and method used in dealing with the railroad property—that they took into consideration the mileage of the railroad within the road district, put all the side tracks and buildings in with the mileage, considered the assessed valuation of the railroad for general purposes of taxation, and that they "did not assess the benefits as high, in proportion, on the railroad as we did on the lands, because we really thought more benefit would go to the land" (Rec. 174-5).

13. Witnesses believed that lands and railroad and other property within the district would increase in value, by reason of the new highway, as much as the "benefits" assessed against each respective parcel of property, during the life of the improvement.

14. All lands in the district are of similar character, and are similar in general to those in Road District No. 1 in Little River County.

15. Agricultural lands were divided into five zones extending, radiating out from the proposed highway. Railroad property, assessed on an *ad valorem* basis, measured by a mileage unit, as required by Section 11 of the Act No. 338 of the Acts of Arkansas for 1915, under which this road district was organized.

16. Commissioners Kinsworthy and Mills had nothing to do with the assessment of benefits on their lands. They were not assessors; they approved the assessments made by the Board of Assessors. Messrs. Thrash, Wood and May. No favor was shown to Kinsworthy and Mills. Counsel for the railroad company in his brief (Pl. Br. 22-25), tries to make it appear that said Kinsworthy and Mills showed—or were shown—favoritism. The record (52-112) shows that Kinsworthy owns 702 acres within the district, total assessed valuation, \$2815.00, total assessed benefits \$7226.00, showing that the ratio of “benefits” to assessed value is 256 per cent. The corresponding figures on Mills’ land are: 998 acres; valuation \$5640.00, “benefits” \$9631.00; ratio, 170 per cent. The corresponding ratio for the K. C. S. Ry. is 25 per cent.

3. Conclusiveness of finding of facts by the officials of the Road Improvement District and by the Arkansas Courts.

We submit that the finding of the Board of Assessors and Commissioners that the property of the rail-

way company herein will be benefited as a matter of fact, and the approval of such finding by the highest court in Arkansas, is conclusive on this court.

In *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, this court said in reply to the objection that the cost of an improvement had been levied by a local tribunal with reference to value and not to benefits conferred, said:

"Assuming that the owner had by the provisions of the Act, and before the land was finally included in the district and opportunity to be heard before a proper tribunal upon the question of benefits, we are of the opinion that the decision of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon the question. It cannot be upon a question of fact of such a nature that this court has the power to review the decision of the State Tribunal which has been pronounced under a statute providing for a hearing upon notice. The erroneous decision of such a question of fact violates no constitutional provision."

In the same case this court says:

"The question of whether any particular land would be benefited by the construction of an improvement is necessarily one of fact." (Citing *Spencer v. Merchant*, 125 U. S. 345.)

Since the *fact* of benefit to the property of plaintiffs in error has been settled affirmatively and conclusively by the administrative and judicial tribunals below, the only important question remaining under this head is whether or not the amount of benefits assessed

on their property is so arbitrary, capricious, unjust and confiscatory as to deprive their railroad company of its property without "due process of law" in violation of the 14th Amendment to the Constitution of the United States?

V. Plaintiffs in error have not been denied the equal protection of the laws in violation of Section 1, of the 14th Amendment to the Constitution of the United States.

1. Proper legal notice was given as required by the statute.

The record (pp. 14-15) shows that proper legal notice by publication was given to plaintiffs in error and they had ample opportunity to be heard on May 14th, 1918, the day when the Little River County Court entered an order creating the road district, and they were present, by counsel, and heard on August 23rd, 1918, when the court confirmed the assessment (Rec. 25-9). Plaintiffs in error do not deny that they did not have requisite legal notice. This court has held that notice by publication is sufficient, and personal notice in such cases is not necessary.

Ballard v. Hunter, 204 U. S., 241.

Huling v. Imp. Co., 159 U. S., 526.

Paulsen v. Portland, 149 U. S. 29.

2. State can classify property for purposes of taxation.

Section 11 of Act 338 of the Acts of Arkansas for 1915 (1412) required the assessors to assess the "benefits" to accrue to railroads on the mileage valuation

basis, thereby recognizing the essential difference in the character of railroad property and urban and rural lands was a valid classification for this particular governmental purpose of local taxation.

In *Royster Guana Co. v. Virginia*, 40 Sup. Ct. Rep., 561, this court said:

"It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for *purposes of taxation*, and the granting of partial or total exemptions upon grounds of policy" (Citing cases).

In *Watson v. Comptroller of New York*, 41 Sup. Ct., 44, this court said:

"Any classification is permissible which has a reasonable relation to some permitted end of governmental action. It is not necessary that the basis of the classification must be deducible from the nature of the things classified. It is enough, for instance, if the classification is reasonably founded in 'the purposes and policy of taxation'" (Citing cases).

Equal protection of the laws is not denied to any person by a statute which is applicable to all persons un-

der like circumstances, and does not subject the individual to an arbitrary exercise of power.

Lowe v. Kansas, 163 U. S., 81.

"Equal protection of the laws," as meant by the 14th Amendment, is not denied by a law or course of procedure which would have been applied to any other person in the state under similar circumstances and conditions.

Tinsley v. Anderson, 171 U. S. 101.

Railway Co. v. Matthews, 174 U. S. 105.

State discrimination in the matter of taxation, when not arbitrary, oppressive or capricious, but founded on a reasonable distinction in principle, is not invalid as denying the equal protection of the laws.

Sugar Ref. Co. v. La., 179 U. S. 89.

The Constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the states. That is left to the state constitution and state laws.

Memphis Gas-Light Co. v. Taxing Dist., 109 U. S. 398.

The provision of the 14th Amendment of the U. S. Constitution that no state shall deny to any person the equal protection of the laws, does not prevent a state from adjusting its system of taxation in all proper or reasonable ways or compel the states to adopt an iron rule of taxation.

Bell's Gap Ry. Co. v. Pa., 134 U. S. 232.

St. L. S. W. Ry. Co. v. Ark., 235 U. S. 350.

Counsel for plaintiff in error states that there are 130 acres of land as such in their right of way, lying within the district. He claims that the assessors should have assessed the railroad property on an acreage basis, the same as rural lands adjoining the railroad. He apparently declines to be bound by the recent decision of this court in *Branson v. Bush*, 251 U. S., 184, which held that a state legislature could authorize the assessment of railroad property on an *ad valorem* basis. In *Bauman v. Ross*, 167 U. S., 589, held that the rule of apportionment among the parcels of land benefited also rests with the discretion of the legislature and may be directed to be in proportion to the position, the frontage, the area, or the *market value* of the lands, or in proportion to the "*benefits*," as estimated by the commissioners.

Fallbrook Irrig. Co. v. Bradley, 164 U. S. 176.

In *Maxwell v. Bugbee*, 40 Sup. Ct. Rep. 6, this court said:

"Equal protection of the laws requires equal operation of the laws upon all persons in like circumstances."

In *Keeney v. New York*, 222 U. S., 535, the court said:

"The 14th Amendment does not diminish the taxing power of the state, but only requires that in its exercise, the citizen be offered an opportunity to be heard on all questions of liability and value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection. It does *not* deprive the states of the power to select the subject of taxation."

The contention of counsel that the railroad property should have been assessed on the same acreage basis as contiguous farm lands is disposed of against him by the cases cited. He divides \$67,900.00 (total benefits assessed on the railway company) by 130 (the bare land acreage in right of way covered by the district) producing the quotient \$525.00, which he says was assessed per acre against the railroad company, while the adjoining rural land was assessed from \$4.00 to \$12.00. He assumes \$8.00 a fair average, then divides \$325.00 by \$8.00 and gets his "Sixty-five times" (Pl. Br. 24-5); and says that the railway property was assessed "Sixty-five times" greater than "the property of the commissioners and the other land owners." This computation is very ingenious arithmetic, but bad law; and does not comply with the facts as shown by the tables of assessments hereinafter (See pp. 77-8 post).

3. Plaintiffs in error have not been discriminated against unfairly.

(a) The railway company has not been discriminated against unfairly in the method of assessment of benefits on an *ad valorem* basis, employing the mileage unit. Such method was fixed by statute and is valid. If any inequality was shown by the assessors, it was in favor of the railway company.

In *Branson v. Bush*, *supra*, this court said:

"If any inequality has resulted from the application of the state law in a customary manner

to a situation frequently arising in our country, it is an incidental inequality, resulting from a valid classification of railroad property for taxation purposes which does not fall within the scope of the 14th Amendment, which 'was not intended to compel the states to adopt an iron rule of equal taxation' " (Citing cases).

The Federal Constitution gives no right to challenge a tax law upon the sole ground of the inequalities of the burdens imposed by the law.

Bank v. Pa., 167 U. S. 461.

Trimble v. Seattle, 231 U. S. 683.

Watson v. Nevin, 128 U. S. 578.

The railroad property is not assessed at a higher rate on an *ad valorem* basis than other real property within the road district, therefore, it is not denied the equal protection of the laws. The respective proportion of "benefits" assessed on the railway property compared with its assessed valuation, and that of the other kinds of property is shown on the Tables of Assessments (See pp. 77-8 post).

(b) The assessment against the railway property was not capricious or arbitrary either in mode of assessment or in amount; neither as a matter of fact nor of law. Counsel for plaintiffs in error cites no case with similarity of facts and procedure which holds that the complaining property owner was "denied the equal protection of the laws."

VI. The assessment of "benefits amounting to \$67,900 on property of plaintiffs in error does not deprive them of their property without due process of law."

A. MEANING OF "DUE PROCESS OF LAW."

We shall not attempt a definition of the phrase, "due process of law" as found in the 14th Amendment to the United States Constitution. As said by this court in *Davidson v. New Orleans*, 96 U. S. 97, the gradual process of judicial inclusion and exclusion as cases involving a construction of the phrase, "due process of law" or presented for decision, shall require, with the reasoning on which each decision is founded, is a better mode than an attempted definition of the phrase. *Green v. Frazier*, 40 Sup. Ct. 501. In the same case the court says. "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements; or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.' " On "due process of law" see:

- Giasza v. Fiernan*, 148 U. S. 657.
- Holden v. Hardy*, 169 U. S. 366.
- Ochoa v. Morales*, 230 U. S. 161.
- Turpin v. Lemon*, 187 U. S. 51.
- Norwood v. Baker*, 172 U. S. 269.
- Kennard v. Louisiana*, 92 U. S. 480.

Law in its regular course of administration through courts of justice is due process, and when secured by the law of the state, the Federal Constitution requirement is satisfied.

Leeper v. Texas, 139 U. S. 462.

Due process of law means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established.

Kilbourn v. Thompson, 103 U. S. 168.

In *Walker v. Sauvinet*, 92 U. S. 90, this court said:

"Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, that is to say, with the constitution and laws of the United States made in pursuance thereof."

B. APPLICATION OF THE DOCTRINE OF DUE PROCESS TO THIS CASE.

The constitutionality of Act 338 of Arkansas (Acts of Ark. 1915, p. 1400) pursuant to the provisions of which, defendant in error was organized, is not challenged. The validity of the formation of the road district in regular procedure is not attacked. We have shown above the property of plaintiffs in error is subject to assessment of special taxes to aid in defraying the cost of the proposed improvement, that said railway property will be benefited by reason of said improved highway, conclusively, both as a matter of fact and as

a matter of law; that the railway company had requisite legal notice (Rec. 14), and ample opportunity to be heard and to appeal to the highest state court; that there are 9.7 miles of main railway track and 1.68 miles of side track, and station property within the district, that the improved highway will be 11.2 miles in length; that "benefits" of \$67,900.00 were assessed on the railroad property; and that the improvement is for a public purpose. The remaining question under this head is: Was the assessment of \$67,900.00 worth of "benefits" on the railway property, under all the facts of this case, so arbitrary, unjust, capricious and confiscatory as to deprive the railway company of its property without "due process of law" as forbidden by the 14th Amendment?

In *Houck v. Drainage District*, 239 U. S. 262, this court said:

"The legislature unless restricted by the state constitution, can create such districts directly, or, as in this case, it may provide for their institution through a proceeding, in the courts in which the parties interested are cited to appear and present their objections, if any. The propriety of a delegation of this sort was a question for the state alone. And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may itself fix the basis of taxation or assessment; that is, it may define the apportionment of the burden, and its action cannot be assailed under the 14th amendment unless it is palpably arbitrary and a plain abuse. These principles have been established by repeated decisions" (citing cases).

In *Goldsmith v. Prendergast Construction Co.*, 40 Sup. Ct. 274, this court said, relative to local assessment for a sewer district:

"As we have frequently declared, this court only interferes with such assessments on the ground of violation of constitutional rights secured by the 14th Amendment, when the action of the state authorities is found to be arbitrary or wholly unequal in operation and effect."

Embree v. K. C. Road Dist., 240 U. S. 242.

Witnell v. Rueckling Const. Co., 249 U. S. 63.

Hancock v. Muskogee, 250 U. S. 454.

The court says in the recent case of *Branson v. Bush*, 251 U. S. 184, that:

"The legislative determination can be assailed under the 14th Amendment only where the legislative action is 'arbitrary, wholly unwarranted, a flagrant abuse, and by reason of its arbitrary character, a confiscation of particular property.' " Unless the assessment can clearly be proved to be of such an obnoxious character "it cannot be maintained that the state has exceeded its taxing power."

Houck v. Drainage Dist., 239 U. S. 265.

Cemetery Ass'n v. Mullins, 248 U. S. 501.

In *Wagner v. Leser*, 239 U. S. 216, the court said:

"This court has frequently affirmed that the general taxing systems of the state are not to be presumed lacking in due process of law, because of inequalities or objections, so long as arbitrary action is avoided. It is not the purpose of the 14th Amendment to interfere with the discretionary power of the states to raise necessary revenues by imposing taxes, and assessments upon property within their jurisdiction."

C. PLAINTIFFS IN ERROR HAVE NOT BEEN DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW BY THE PROCEDURE IN THIS CASE, BECAUSE:

1. The procedure was lawful under a valid statute, and the road district was validly organized pursuant thereto.

In *Jett Bros. Distilling Co. v. Carrollton*, 40 Sup. Ct. 256, this court said:

"The mere objection to an exercise of authority under a statute whose validity is not attacked, cannot be made the basis of a writ of error from this court."

The general system of procedure for the levy and collection of taxes which is established in this country is, within the meaning of the constitution, "due process of law."

Kelley v. Pittsburgh, 104 U. S. 78.

2. The railway company had proper legal notice, a chance to be heard on the question of amount of assessment of "benefits," and the right of appeal.

The fact that plaintiffs in error had requisite notice and a chance to be heard to contest the correctness of assessments on their property and a right to appeal are not denied. The statute provides for publication of notice and grants the right of appeal. (Sections 1, 3, 13, 14 Acts of Ark., 1915, p. 1400) (Rec. pages 11, 14, 25, 33, 38, 50, 117.)

A state statute which authorizes the assessment and collection of a tax to defray the cost of a local improve-

ment, organized pursuant to its provision, and provides for notice to all property owners interested, and a proper mode of contesting the tax in a court with right of appeal to higher courts does not deprive such person of his property without due process of law. Due process of law requires that the tax payer be given notice of the matter and an opportunity to be heard at some stage of the proceedings as to the justness of the proportion of the cost of the improvement levied on his property.

Embee v. K. C. Rd. Dist., 240 U. S., 242.

Lent v. Tilson, 140 U. S., 316.

Railway Co. v. Backus, 154 U. S. 421.

Palmer v. McMahon, 133 U. S., 660.

Walston v. Merwin, 128 U. S., 578.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S., 112.

Hagar v. Reclam. Dist., 111 U. S., 701.

Bowman v. Ross, 167 U. S. 548.

Hibben v. Smith, 191 U. S. 310.

Spencer v. Merchant, 125 U. S., 345.

Wells-Fargo v. Nevada, 248 U. S., 165.

Solian v. Heskin, 22 U. S., 523.

Pearson v. Yewdall, 95 U. S., 294.

Turner v. Wade, 41 Sup. Ct., 28.

Cemetery Assn. v. Mullins, 248 U. S., 501.

The decisions of this court, *supra*, establish:

1. That the apportionment of a special tax or assessment for a local improvement may be committed for decision to any local board or tribunal which the legislature may see fit to designate to perform such function.
2. Where the apportionment of the tax or the duty to ascertain what property will be benefited, and to what

extent has been entrusted to such local board, it acts in a quasi-judicial function, and the property owner is entitled to notice and an opportunity to be heard at some stage of the proceedings before the levy becomes final;

3. Where such notice and a chance to be heard are provided by the statute, and the property owner is notified and has ample opportunity to be heard as to the amount of the tax charged to his property, with right of appeal to higher courts, and the whole tax proceedings are regularly carried out under a valid statute, then said owner of such property so assessed for the special improvement tax is not deprived of his property with due process of law, where the proof clearly shows that his property will be benefited by reason of the construction of said improvement, unless the evidence shows plainly that said assessments are palpably arbitrary and capricious, wholly unwarranted, excessive and confiscatory of his particular property, and impose a burden without a compensating advantage of any kind.

In *Davidson v. New Orleans*, 96 U. S. 97, an early leading case, frequently approved since, the court said:

"Whenever by the laws of a state or by statute authority, a tax assessment, servitude or other burden is imposed upon property for the public use, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with notice to the person, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law."

The rule is also well stated in *Londoner v. Denver*, 210 U. S., 388 and cases cited.

3. The assessment of "benefits" on the railway property was fair and equitable, and they were not levied in an arbitrary, capricious manner.

As stated above, not a witness for the railway company gave as his opinion that the proportion of "benefits" assessed upon its property was levied in an arbitrary manner or was unjust and inequitable. Said witnesses centered their batteries upon the proposition of "absolutely no direct benefit" and they fired broadsides repeatedly on that point.

The witnesses for the road district testified that they thought the assessment of "benefits" on the railroad property was fair and equitable, as compared with the assessments on other property in the district, and gave their reasons. Mills, one of the commissioners who approved the assessment, considers it fair (Rec. 159). Ferrell, an expert assessor in such matters, says that in view of the fact that the improved highway connects at Ashdown with Road District No. 1, and will divert farming products which have been taken into a county seat, to the Kansas City Southern, he does not think it is very much out of line (Rec. 171). Wood believes it is a fair assessment according to the benefits the railroad will receive (Rec. 175); so does May, who has been an assessor in four districts (Rec. 180) and Kingsworthy, one of the commissioners (Rec. 183).

There is no proof that the assessors pursued an arbitrary, capricious method. They met in regular capacity, as a board, after qualifying, and devoted three days to the work of assessing the benefits on the property within the district, they filed their report in which they de-

clared their belief that the assessment of benefits so made was "fair, just and equitable" to all owners of property assessed in the district (Rec. 47-8). They had before them as guides, the plat of the district furnished them by the State Highway Department and the engineers for the district, and the assessed valuation of the property for state and county purposes. They took into consideration the value of the railroad property within the district, its side tracks and buildings, the development which had come in adjacent territory by reason of the construction of a gravel road; and they believed that during the life of the improvement, and by reason thereof, the railroad property would enhance in value in the sum of \$67,900.-00. Instead of having in mind, either consciously or negligently, to place a burdensome, arbitrary assessment on the railroad property, their desire of fairness is disclosed by Dr. Wood's statement (175): "We did not assess the benefits as high, in proportion, on the railroad as we did on the lands, because we really thought more benefit would go to the land" (Rec. 172-4).

Counsel for plaintiffs in error (Pl. Br. 17) tries to make it appear that Wood considered the *entire mileage* of the railroad. The entire mileage of the road had not been introduced in evidence. No proof to show that witness knew the entire mileage. He was obviously speaking of the mileage within the district as he had just examined the plat of the district. He said the side tracks and buildings were considered in with the mileage (Rec. 174). It is just as logical, and would be fair, for counsel to argue that witness also took into consideration

every side track and building on said *trunk line* of railroad extending, as he says the record shows, "from Kansas City to the sea, at Port Arthur." There is no allegation that the assessors acted fraudulently or in bad faith. They honestly believed that the amount of "benefits"/namely, \$67,900.00—would accrue to the railroad property during the life time of the bonds, or during the life of the improved highway. As witness, May, said: "They will derive benefit from it as long as the road stays there, and of course the road is going to stay there" (Rec. 181).

There is no proof to show that the officials of the road district were guilty of a flagrant abuse of power in any manner. If the assessment of \$67,900.00 of "benefits" on the railroad property should be deemed too high by this court, it can only be said that the road district officials acted erroneously or under an honest mistake of judgment as to the fact of *amount* of "benefits" the railway property should bear; and that they were not culpably negligent or guilty of bad faith or intended to confiscate the railroad property. The highway officials are men of fine business ability, broad information, and integrity of character; and no charge will be made against them that they knowingly acted arbitrarily and made an inequitable assessment on the railway property. There is no proof to show that the assessors knowingly and arbitrarily imposed the amount of "benefits" on the railroad property out of all regard or proportion to the "benefits" which will reasonably inure to said property. Their rule of measurement was the "benefits" which would accrue. That was the basis of their assessment.

4. There is no proof to show that the assessment of "benefits" amounting to \$67,900.00 on the property of plaintiffs in error? Is (a) unjust or unreasonable, (b) exorbitant and burdensome, (c) excessive or wholly unwarranted, or (d) is clearly confiscatory of their particular property, taking into consideration all the facts, and circumstances and law of the case.

(a) *Burden of Proof.*

The burden of proof is upon plaintiffs in error to establish by preponderance of the evidence that the proportion of "benefits" assessed on its property is plainly excessive and burdensome, inequitable and arbitrary, and obviously confiscatory. *Hines v. Road Imp. Dist.*, 224 S. W. (Ark.) 817. Unless they can do this, then the court will not interfere in the matter.

In *St. Mary's Cemetery Assn. v. Millins*, 248 U. S. 505, this court said:

"It is well settled that unless such assessment is arbitrary and unreasonable the extent of the benefit, essential to justify the assessment, was a matter within the control of the local authorities."

Wagner v. Baltimore, 239 U. S. 207.

In *Withnell v. Ruecking Const. Co.*, 249, U. S. 71, the court said:

"The attack upon constitutional grounds because of the system which the charter authorized in making the assessment can only succeed if it has produced results as to plaintiff in error's property, palpably arbitrary or grossly unequal."

In the absence of clear proof to the contrary, the validity of the assessment on the railway property in this case is presumed.

In *Breen v. Frazier*, 40 Sup. Ct., 501, this court said:

"When the constituted authority of the state undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action."

(b) *Reference to Testimony.*

As stated above, no witness for plaintiffs in error characterized this assessment of "benefits" on the railroad property as palpably arbitrary, grossly unequal or confiscatory. Their claim was for absolute exemption from any assessment whatever. They did not admit their property would be liable for a reasonable assessment and advise the courts what amount it should be. With all their expert knowledge on the matter they shed no light on that question, when at the time it was a matter of general knowledge that the Arkansas Supreme Court had held, in several cases, that railroad property was subject to taxation for local public improvement purposes; and they knew that plaintiff in error was paying part of the cost of constructing a gravel road parallel to it in District No. 1, in Sevier County, and in District No. 1, in Little River County, which districts are just north and south of the defendant in error. (Rec. 6).

Strange to say, no traffic man or financial agent was called to show the financial status of the railway company. The amount or volume of traffic originating or

delivered in said road district, the rate of earnings, etc.; and that said assessment would prove harmfully burdensome, that the company could not pay it; therefore, the tax would be "wholly unwarranted and confiscatory." All the witnesses for the road district, some of whom had known the property of the railway company ever since the track was laid, testified that the assessment of "benefits" on the railway property was fair and equitable; and their evidence stands uncontradicted. Plaintiffs in error failed to show by any kind of proof that the assessment against its property would prove oppressive or more than it in reason and fairness should pay. The record is as silent as the Sphinx on the part of the railway company on the only material and important Federal Constitutional question in the whole case at bar.

(c) *Cost to the Railway Company.*

Plaintiffs in error presented no figures by their fiscal agent or by any one showing a computation or estimate of the cost to the railway company of its proportion to build the proposed gravel road. The record (Rec. p. 113), estimates the total cost will be \$112,077.00; the total "benefits" assessed on all property as \$309,376.00; the total "benefits" on the railroad property as \$67,900.00 (Rec. 110).

Section 19 of Act 338 (Acts of Arkansas, 1915, p. 1418) provides that the tax to pay for the improvement "is to be paid by the real property of the district in proportion of the amount of the assessment of benefits thereon." \$67,900.00 is about 22% of \$309,376.00.

Then the railway company, during the life time of the bonds, say 20 or 30 years, will pay 22% of \$112,077.00, or an approximate total of \$24,656. If this computation be on the correct principle, there is no proof to show that the railway company will be unable to pay its annual installment or its total proportional cost.

(d) *Statistics In Re Property in Defendant in Error.*

TABLE No. 1.

Kind of Property.	Assessed Value for County and State Taxation. ¹	Total Assessment of "Benefits" by Board of Assessors.	Ratio "Benefits" to Assessed Value.
All property- lands, rail- roads, etc.	\$462,402.00	\$309,376.00	66.8 per cent
Plaintiffs in er- ror property	270,220.00	67,900.00	25.12 per cent
Same per mile	27,000.00	7,000.00 ²	25.9 per cent
Lands and lots	119,935.	221,906.00	198.24 per cent
Public Service Corporations	350,467.00	87,435.00	24.9 per cent

1 Presumably 50% of true market value.

2 Total mileage is 11.38 counting side track, would make \$6,037.

TABLE No. 2.

Kind of Property	Total "Benefits" Assessed	Per Cent of Total "Benefits" Assessed
All property (total)	\$309,376.00	100 per cent
Plaintiffs in Error's property	67,900.00	21.9 per cent
All other property	241,476.00	78.1 per cent
Lands and lots	221,906.00	71.8 per cent
All corporations in- cluding plfts. in error	87,435.00	28.2 per cent

TABLE No. 3.

Miscellaneous Data.

1. Total length of proposed highway 11.2 mi.
2. Miles of railroad in district:

Main track	9.7 mi.
Side track	1.68 mi.
	11.38 mi.
3. Assessed value of side track, \$3,000.00 per mi.
4. Total value of side track.....\$5,040.00
5. \$67,900.00 divided by \$270,220.00 equals 25.12%
estimate that railroad property will increase in
value, or 12½% on a 100% valuation.
6. \$111,935.00 divided by \$221,906.00 equals 198.24%
estimate urban and rural property will increase in
value, or 99.12% on a 100% basis.

7. 130 ACRES IN RAILROAD RIGHT OF WAY;
23,585 ACRES IN ALL.

It is seen from Table No. 1 above that property of plaintiffs in error was assessed for "benefits" at only 25% of its valuation as assessed for general purposes of taxation, while urban and rural lands were assessed at 198 per cent. This shows clearly that the inequality or discrimination, if any, is in favor of the railroad property.

From Table No. 2 it is seen that the proportion of "benefits" imposed on the railroad property in this case is about 22% of the total "benefits" assessed on all property within the district, while brief of counsel for defendant in error in the case of *Branson v. Bush*, 251 U. S., 184, quote witnesses as showing that under the assessment in that case the Missouri Pacific Ry. Co. will pay about 28% of the cost of constructing the improved highway, three and one-half miles long southward from Alma, Arkansas, and this court *upheld* the assessment upon the railway company in that case.

In the case at bar the average assessment of "benefits" on acreage lands, including lots, is about \$9.46 per acre; or an average of about 198 per cent more than their assessed valuation for general purposes of taxation. If the same ratio had been applied to the railroad property, it would have been assessed for "benefits" in the sum of \$535,000.00; that is, \$55,154.00 per mile on main track, when in fact they were assessed for only \$7,000.00 on their main track; when \$5,040.00 worth of said track was considered in with the assessment. Yet, counsel

claims that the railroad property was assessed "Sixty-five times" greater than the farm lands. Making the computation on an *ad valorem* basis, the above figures show that the urban and rural lands were assessed, for "benefits" at a ratio nearly "EIGHT TIMES" higher than the railroad property.

(e) In the absence of direct proof on the point, can this court say, as a matter of law, under the facts of this record, that the amount of "benefits" assessed on the railroad property, is palpably arbitrary and confiscatory, and thereby violates the "due process" clause of the 14th Amendment to the Federal Constitution?

The above question is the only issue left in this case, and, in fact, the only controversial question with which to begin. If this court answers said question in the affirmative then, we respectfully submit, it will reverse this case with findings of a stated assessment, and remand it to the Arkansas courts with directions to enter said finding, and to certify the same to the officials of the Road District and to the Little River County Court. If this court should answer said question in the negative, then we submit that this cause should be affirmed.

(f) *Extracts from Decisions:*

In *Wagner v. Covington*, 40 Sup. Ct., 94, this court said: "When this court is called upon to test a state tax by the provisions of the constitutions of the United States, our decision must depend, not upon the form of the taxing scheme, or any characterization of it

adopted by the courts of the state, but rather by the practical operation and effect of the tax as applied and enforced."

St. LSW Ry. Co. v. Arkansas, 235 U. S. 350.

Shaffer v. Carter, 40 Sup. Ct. 226.

American Mfg. Co. v. St. Louis, 250 U. S. 463.

When local improvements may be deemed to result in special benefits, classification of property may be made and special assessments imposed accordingly; but in such a case, there is no requirement of the federal Constitution that for every payment there must be an equal benefit. *Houck v. Drainage District*, 239 U. S. 265.

It is not the rule that state taxes, levied for general purposes or special assessment are void, unless even and exact justice is done in each instance, or merely because such taxes in individual cases work hardships or impose unequal burdens.

Henderson Bridge Co. v. Henderson, 173 U. S. 613.

In *Kelly v. Pittsburg*, 104 U. S. 78, this court disposing of the contention that the assessments were excessive, said:

"Whether that be true or not, we cannot here inquire. We have so often decided that we cannot review and correct in this court, the errors and mistakes of the state tribunals on that subject, that we can only refer to those decisions without a re-statement of the argument" (citing cases).

It is plain that the fact of the amount of the benefits which any property will receive, especially, railroad

property, which is essentially different from other real estate, is not susceptible of accurate determination. An *ad valorem* method may be adopted to ascertain "benefits" or the commissioners may adopt the "benefits" themselves, as a basis.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 176.

Houck v. Drainage Dist., 239 U. S. 265.

The concurrent finding of fact by two lower courts will be accepted as correct by the Supreme Court, where no adequate reason appears for challenging the correctness of such findings.

Southern Pacific Co. v. Bogert, 250 U. S. 483.
Railroad Co. v. Collins Produce Co., 249 U. S. 186.

This court will not hold a tax void because, if called upon, it might have adopted a different system or rule for ascertaining the taxable value on which the percentage of taxation should be arrived at, provided the rule adopted is not unfair or unjust. *W. U. Telegraph Co. v. Mass.*, 125 U. S. 530.

(g) *The Judgment of the Road Commissioners and Assessors Should be Respected.*

As there was no evidence of fraud or arbitrary action by the road district authorities due deference should be given their judgment as to the amount of "benefits" the railway company should receive. Before the assessment of "benefits" made on the railway property can be condemned, it must show that the assessors exercised

their authority so arbitrarily as to compel the conclusion that such action was not the reasonable exertion of the power of taxation, but the confiscation of property as their aim. *Brushaber v. Ry. Co.*, 240 U. S. 1.

In *Spring Valley Waterworks v. Schottler*, 110 U. S. 354, this court said, commenting upon the duties and powers of local improvement district officials:

"Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule."

In *Mo. Pac. Ry. Co. v. Road Improvement District*, 137 Ark. 573, the Arkansas Supreme Court said:

"An estimate of benefits resulting from a local improvement to a given piece of property is largely a matter of opinion, and generally there is a wide difference of opinion on such questions. Under those circumstances, a great amount of deference is due to the judgment of the board of assessors who are constituted as a special tribunal for the purpose of determining that question, and courts reviewing the proceedings of the assessors should not substitute the judgment of the judges for that of the assessors, unless the evidence clearly shows that the assessments are erroneous. * * * Railroad property is subject to assessment for local improvement, the same as other kinds of real estate, but the ascertainment of benefits to that kind of property is more difficult for the reason that it stands, to some extent, in a class by itself. Still, the inquiry as to that kind of property is to ascertain the enhance-

ment in value or benefits to accrue from the construction of the improvement, and all of the elements which tend to create such benefits are to be considered."

The same doctrine is announced in the following cases:

Rogers v. Highway Imp. Dist., 139 Ark. 325.
Board of Imp. Dist. v. Gas. Co., 121 Ark. 105.
Oates v. Drainage Dist., 135 Ark. 156.
Alcorn v. Bliss, 133 Ark. 125.

In *Wilkinson v. Road Imp. Dist.*, 141 Ark. 168, the court said:

"In making the assessment to pay for any proposed improvement the question is to what extent will the proposed improvement enhance the value of the property against which the assessment is to be levied, for it is this enhanced value which is taxed. The method of arriving at that enhanced value is to be determined by the men charged with that duty, and, as we have frequently said, the judgments of the judges reviewing the assessments should not be substituted for that of the assessors who made the assessments unless the evidence clearly shows that the assessment is erroneous." * * *
 "Mathematical accuracy in this respect is not required because values and benefits are at last mere matters of opinion and we can expect nothing more than an intelligent judgment honestly and fairly exercised."

In the case at bar, the commissioners and assessors were fair, intelligent, successful men of affairs, who testified that it was their purpose to make a fair, just and equitable proportionate assessment of "benefits," and that the assessment on the mileage valuation basis of the

railroad, and upon the zone basis of farm lands met that requirement.

In *Mo. Pac. Rd. Co. v. Conway County Bridge District*, 134 U. S. 299, and the same case again in 218 S. W. (Ark.) 189, it appears that the "benefits" assessed on the railroad property was over 23 per cent of the total "benefits" assessed on all property within the bridge district, and said assessment was upheld and declared not excessive or discriminatory.

In *S. L. Rd. Co. v. Bridge Dist.*, 113 Ark. 496, the court said:

"The estimated growth of population in the locality may be reasonably expected to increase the traffic, even with the additional competition. * * * The assessment of future benefits is largely a matter of estimate and to some extent speculative. * * * We must depend largely upon the opinions of men of sound judgment and reasonable information on the subject, to determine what the future benefits will probably be. If it were necessary to find an exact standard, a measure of benefits in advance would be impossible. That view of the matter would necessarily lead to the conclusion that benefits must be enjoyed before there can be an assessment to pay for the improvement, which would be a contradiction in itself."

The foundation of this familiar form of taxation for local public improvement is a question of theory. The amount of benefit which an improvement will confer upon particular land is a matter of forecast and estimate.

L. & N. RR. Co. v. Barber Asphalt Paving Co.,
197 U. S. 433.

In plaintiffs in error's "Bill of Objections" filed in the courts below, there were allegations amounting merely to an assertion that the assessment of benefits complained of was excessive, and were not sufficient to show that no benefits at all would accrue to the railroad property. See *Nettles v. Road Imp. Dist.*, 223 S. W. (Ark.) 399.

Taking into consideration the additional territory in Little River and Sevier Counties which will be opened up, and its trade brought to markets on plaintiffs in error's line, by reason of the construction of the highway proposed, that it will be the final connecting link in a system of highways running through Polk, Howard, Sevier and Little River Counties across a new steel bridge across Little River at Mill's Ferry, and across Red River at Index, into Texarkana, Arkansas, which is a gateway into four states: Arkansas, Texas, Oklahoma and Louisiana, the increased traffic which will come to the railway, the great need for the completion of said final connecting link, the increase in population sure to follow, the larger and more varied crops which will be raised, the reduced cost of overland transportation and general and direct benefit to the people of the territory affected, and those of adjoining counties, we submit that said assessment of "benefits" of plaintiffs in error's property, is not excessive and should be ratified and affirmed by this court.

In *Mattingly v. Dist. of Columbia*, 97 U. S. 692, this court said:

"It may be that the burden laid upon complainant's property is onerous. Special assessments for road or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area or market value of the adjoining property, at its discretion, is, under the decisions no longer an open question."

In *Hagar v. Recla, Dist.*, 111 U. S. 701, it was said:

"All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received. Absolute equality in imposing them may not be reached; only an approximation to it may be obtainable."

VII. The assessment of "benefits" and levy of a special tax thereon, on the railway property, does not violate the "interstate commerce" clause of the United States Constitution.

1. Aim of the Tax.

It is clear that the tax imposed on property of plaintiffs in error covers only that lying within the road district, and is aimed to require the railroad property to bear its share of the cost of the improvement.

Said tax is not aimed at the privilege of engaging in interstate commerce, nor is it levied upon the commodities carried by the railway company in interstate commerce, nor upon the transaction or business of doing interstate commerce, nor upon the net or gross receipts of the carrier derived from its interstate commerce traffic. This special improvement tax in the case at bar

does not fall under any of the heads or classifications of a state tax which this court has held void because it was a restraint on interstate commerce.

It is well settled that a state may tax either for general purposes or for a local improvement, a carrier's property lying within the state, county or district, although such property is used chiefly in interstate commerce.

- Wells-Fargo Co. v. Nevada*, 248 U. S. 165.
St. L. Ry. Co. v. Arkansas, 235 U. S. 350.
Wis. R. R. Co. v. Powers, 191 U. S. 379.
Underwood Typewriter Co. v. Chamberlain, 41 Sup. Ct., 45.
Telegraph Co. v. Philadelphia, 190 U. S. 160.
Robbins v. Taxing Dist., 120 U. S. 489.
Gloucester Ferry Co. v. Pa., 114 U. S. 196.
Ficklen v. Taxing Dist., 145 U. S. 1.
W. U. Tel. Co. v. Texas, 105 U. S. 46.
Cleveland Ry. Co. v. Backus, 154 U. S. 439.
Adams Express Co. v. Ohio, 165 U. S. 194.
Ry. Co. v. Texas, 210 U. S. 217.
Union Tank Line v. Wright, 249 U. S. 275.

The substance, and not the shadow, determines the validity of the exercise of the power of taxation attacked as a regulation of interstate commerce.

- Postal Tel. Co. v. Adams*, 155 U. S. 688.

The constitutionality of a state tax asserted to be repugnant to the commerce clause is determined not by the form or agency through which it is collected, but by the subject upon which the burden is laid.

- Phil. R. R. Co. v. Pa.*, 15 Wall. 232.

To render a state tax invalid as interfering with interstate commerce, such interference must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance.

New York R. R. Co. v. Pa., 158 U. S. 431.

In determining whether a state tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause of the Federal Constitution, the substance of the exaction must be regarded—its operation and effect enforced—and not the manner in which the taxing scheme has been characterized.

Kansas City Ry. Co. v. Botkin, 240 U. S. 227.

Plaintiffs in error introduced no evidence showing the character or extent of their interstate commerce, and how the payment of said special tax would affect their interstate commerce business.

We submit that said assessment on the railroad property will not prove to be a restraint on interstate commerce, either as a fact or as a matter of law. We submit that plaintiffs in error have not proved that the assessment of "benefits" against their property is excessive. There is not a syllable of testimony on that point. Nor do the facts warrant their contention that the assessment was arbitrarily made without regard to the benefits which would accrue to their property.

As was said in Board of Equalization cases, 49 Ark. 533:

"The only remedy is by proof of the fact that the assessment is too high on appeal."

VIII. Reference to cases cited in brief of plaintiff in error.

1. **Gast, Realty & Inv. Co. vs. Schneider Granite Co., 240 U. S., 55.**

Counsel cites the above case (Pl. Br. 49). In this case the facts showed that the lots of defendants and the lots adjoining were the same character of property and lay side by side; that the laying out of the district was done blindly and mechanically, without regard to any rule for measuring benefits to accrue; that the line jumped back arbitrarily on defendants' property, thereby showing plainly that defendant's property would be taxed disproportionately to similar adjoining property where "the differences were not based upon any consideration of difference in benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied." The court did not hold the benefits assessed excessive, but held that the ordinance as drafted and the authority exercised thereunder were void because said ordinance being unreasonable and arbitrary—"a farrago of irrational irregularities throughout"—permitted the imposition of a grossly unequal tax on similar kinds of property, included within an improvement district enclosed by boundary lines mechanically made. The ordinance was "bad upon its face" in that case.

The constitutionality of Act 338 of Arkansas (Acts of Ark., 1915, p. 1400) under which defendant in error in the instant case was organized, is not attacked. Therefore, the case cited does not control the case at bar.

2. Myles Salt Co. vs. Iberia & St. M. Drainage District, 239 U. S., 478, (Pl. Br. 51).

In the case cited the commissioners included within the Drainage District, Weeks Island and the salt deposit therein, when it was clear to even the casual observer that said island, standing high and dry above the surrounding marsh lands, would never receive one cent of benefit from the drainage system constructed, but was assessed solely for the purpose of deriving reviving revenue to pay for benefit to other property. In such a case the power of taxation was arbitrarily exerted because the aim of the tax was wrong, and the effect would be an act of confiscation, because, under the undisputed facts, "a burden was imposed without a compensating advantage of any kind." The court did not hold the taxes assessed against the island too high, but held that, in view of the absence of proof of any benefit, direct or indirect, that a tax levied thereon solely to get revenue to pay for a benefit to other property, would deprive the owners of said island of their property "without due process of law."

In the instant case we have shown conclusively as a matter of law and of fact, that plaintiffs in error's property will be benefited by the construction of the proposed gravel road. In the case cited there was not *fact* of benefit to the property in question. In the case at bar the *fact* of benefit to the railroad property is established by the law and by the evidence.

3. **Hancock vs. City of Muskogee, 25 U. S., 454 (Pl. Br. 50).**

In the case cited this court upheld the assessment to pay for construction of a sewer system under an ordinance which did not provide for notice or a hearing to property owners affected by the special tax. We admit that this court, as shown by the decisions cited; can and does interfere when the clear proof is that the taxing power of the state has been exercised arbitrarily and in an oppressive confiscatory manner. But the facts of the case at bar raise no such question.

4. **Branson vs. Bush, 251 U. S., 184 (Pl. Br. 52).**

This cited case should be deemed relevant to the case at bar for these reasons:

(a) Both cases involve the construction of improved roads in Arkansas.

(b) In the Branson case the Missouri Pacific Railway Company was required to pay about 28% of the cost; or nearly 50% (See pp. 12, 83 of Brief of Appellee). In the case at bar, the railroad company would not pay over 22%.

(c) There was a legislative determination of the fact of "benefit" to the railroad company in both cases. (Sec. 5, Private Acts of Ark., 1911, p. 42; and Sec. 11, Acts of Ark., 1915, p. 1412).

(d) Railroad property pursuant to the statute in each case was assessed on an *ad valorem* basis with a mileage unit upon a "benefit" consideration.

(e) In the case cited the railroad property was not in the road district at all. In the instant case the railroad right of way lies parallel to the improved highway proposed, and will receive a physical benefit from drainage of ponds of surface water on west side of track (Rec. 150).

(f) In that case the improved road was short—three and one-half miles, running south from Alma. In this case, the highway will be 11.2 miles long, and the final connecting link of a long north and south highway through southwestern Arkansas (Rec. 168).

(g) In that case trade from a small area south of Alma was turned from Van Buren to Alma, constituting the "benefit" to the Missouri Pacific Railroad Company. In this case trade will be turned from south end of Sevier County, and northwest and western part of Little River County, to Wilton and to Ashdown, on the line of plaintiffs in error. Four times as much trade territory will be given an outlet to the Kansas City Southern Railway in this case, as was given to the Missouri Pacific Ry. in the Branson case.

(h) In the Branson case the competition spoken of by the railway company was the main line of the Frisco Railroad, at Van Buren, Ark. In this case, plaintiffs in error is the only trunk line serving the two counties involved (Rec. 160). The Frisco at Ashdown is only a branch line, while the M. D. & G. Railroad is a "jerk water" branch, now struggling for life in the hands of a receiver.

(i) In that case counsel for the railroad company strenuously contended that their property was not benefited at all, and their witnesses so testified (See Brief of Appellee, pp. 11-14). Also, that the railroad property should be assessed on an acreage basis, the same as the adjacent farm lands (p. 49); also, that the franchise value of the railroad was assessed (p. 56), but this court denied and overruled all three contentions.

In the case at bar, counsel for plaintiffs in error devote much space to the same three contentions, but they have already been decided adversely.

(j) In that case this court held that the method and amount of assessments of special tax on the railroad property were *not*, on the evidence adduced, arbitrary, capricious or confiscatory; and therefore, not in contravention of the 14th Amendment.

We submit that, upon the evidence in the case at bar, the court should affirm this cause.

IX. Conclusion.

We submit that the tax proceedings in this case were regular and in conformity with the terms of the statute under which the road district was created. Plaintiffs in error had notice and have been heard in three separate courts in Arkansas. They have the burden of proof to show that their property will be taken without due process of law. They must win their case upon the facts as shown by the record that said assessment of "benefits" on their property is excessive and confiscatory, and not by general allegations or assertions

of opinion by counsel. We submit that they have not made out their case, either by the testimony or by the law. Can this court say, as a matter of law, that said assessment of "benefits" is confiscatory when there is not a scintilla of proof on that point, even by the railroad's own witnesses?

As the "benefits" assessed are a matter of estimate, can this court say as a matter of law, or of fact, that this estimate made by fair-minded, intelligent, well-informed successful business men, who are the commissioners and assessors, was erroneous, in the absence of any proof to the contrary? Will this court substitute its judgment for that of the commissioners and assessors upon the finding of fact as to what proportion of "benefits" should be charged to the railroad property in this case?

We believe that the proof clearly shows that the property of the plaintiffs in error will be materially benefited by the improvement proposed, and that the assessment of "benefits" amounting to \$67,900.00 upon their property is not arbitrary or confiscatory. Surely their property will enhance that amount—only 12½% of its full valuation—during the life of the proposed gravel road, which, when built, will be the final connecting link in a highway nearly 100 miles long, beginning at the northern end of Sevier County, Arkansas; thence through Little River County, over the new steel bridge across Red River—the only bridge over said river between Denison, Texas and Shreveport, La.—into Texarkana, the gateway into four states.

We respectfully submit that this cause should be affirmed.

Respectfully submitted,

JOHN J. DuLANEY,
Counsel for Defendant in Error.

A. D. DuLANEY,
Of Counsel.



FILED

MAR 5 1921

JAMES D. MAHER,
CLERK

Supreme Court of the United States

OCTOBER TERM—1920.

No. 205.

THE KANSAS CITY SOUTHERN RAILWAY
COMPANY and TEXARKANA AND FORT
SMITH RAILWAY COMPANY,

Plaintiffs-in-Error,

vs.

ROAD IMPROVEMENT DISTRICT NUMBER
SIX OF LITTLE RIVER COUNTY, AR-
KANSAS,

Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF ARKANSAS.

REPLY BRIEF OF PLAINTIFFS-IN- ERROR.

SAMUEL W. MOORE,
JAMES B. McDONOUGH,
FRANK H. MOORE,
of Counsel.



SUBJECT INDEX.

	PAGE
Some Additions and Corrections to Statement in Brief of Defendant-in-Error ..	1-10

Argument:

Point I. The application to the conceded facts of this case of the rule of Branson vs. Bush, relied upon by defendant-in-error, leads inevitably to the conclusion that the assessment in this case is so plainly arbitrary and so grossly excessive as to amount to a confiscation of the property of the plaintiffs-in-error	10-22
--	-------

Point II. The assessment of benefits to farm and city property on an area basis, and to railway property on a different and higher basis, violated the Due Process and Equal Protection Clauses of Section 1 of the 14th Amendment	23-30
--	-------

Cases and Authorities Cited.

	PAGE
Acts Ark. 1911, page 233; Sec. 5	15, 28
Alexander Law, Act 338, Ark. 1915, Sec. 11; Sec. 24	2, 8, 19
Backus Case, 154 U. S., 439, 445	11
Branson vs. Bush, 251 U. S., 181. 10, 11, 14, 18,	28
Canada Southern R. Co. vs. International Bridge Co., L. R. 8 App. Cas., 723, 731 ..	12
C., C., C. & St. L. R. Co. vs. Backus, 154 U. S., 439, 445	11
Coffman vs. St. Francis Drainage Dist., 83 Ark., 54	30
Constitution of U. S., 14th Amendment	1-4, 19, 23, 24, 26, 27
Cotting vs. Godard, 183 U. S., 79	12
Fargo vs. Hart, 193 U. S., 490	13, 15
Fourteenth Amendment, Constitution of U. S.	1-4, 19, 23, 24, 26, 27
Gast Realty Co. vs. Schneider Granite Co., 240 U. S., 55	18, 27, 28
Houck vs. Little River Drainage Dist., 239 U. S., 254	25, 27, 28
Indiana R. Co. vs. Connelly, 10 Ohio St., 160	25
K. C. Ry. Co. vs. Road Imp. Dist. No. 6, 139 Ark., 424	6
Kirst vs. Street Imp. Dist., 86 Ark., 1	30
Lee Wilson & Co. vs. Road Imp. Dist. No. 1, 127 Ark., 310	9
Louisville & Nashville R. Co. vs. Greene, 244 U. S., 522, 540	16
Martin vs. Dist. of Columbia, 205 U. S., 135, 139	28
Monongahela Nav. Co. vs. United States, 148 U. S., 312	12

	PAGE
Myles Salt Co. vs. Iberia Drainage Dist., 239	
U. S., 478	18, 19
Norwood vs. Baker, 172 U. S., 269	18
Peavy vs. City of Little Rock, 32 Ark., 31	30
Raymond vs. Chicago Union T. Co., 207 U. S.,	
20	19, 26
Royster Guano Co. vs. Virginia, 253 U. S., 412	26
St. L. S. W. R. Co. vs. Com'rs, 265 Fed., 524,	
528	21
State Railroad Tax Cases, 92 U. S., 579, 608 ..	14
Thibault vs. McHaney, 119 Ark., 188	30
Union Tank Line vs. Wright, 249 U. S., 274 ..	13
Wilson & Co., Lee vs. Road Imp. Dist. No. 1,	
127 Ark., 310	9



Supreme Court of the United States

OCTOBER TERM—1920.

THE KANSAS CITY SOUTHERN
RAILWAY COMPANY and TEXAS-
KANA AND FORT SMITH RAIL-
WAY COMPANY,

Plaintiffs-in-Error,

vs.

ROAD IMPROVEMENT DISTRICT
NUMBER SIX OF LITTLE RIVER
COUNTY, ARKANSAS,

Defendant-in-Error.

No. 205.

REPLY BRIEF OF PLAINTIFFS-IN- ERROR.

SOME ADDITIONS AND CORREC- TIONS TO STATEMENT IN BRIEF OF DEFENDANT-IN-ERROR.

1. Defendant-in-error correctly states, on pages 18 and 19 of its brief, that the Supreme Court of Arkansas, in deciding that the assessment of benefits on the property of the railway companies was not inequitable or excessive, held, by implication, that the 14th Amendment of the Constitution of

the United States had not been violated, thereby involving Federal questions.

The contentions of plaintiffs-in-error (in addition to the contention that the assessment of benefits constituted an unlawful burden upon interstate commerce, as to which we content ourselves with the argument contained in our original brief), may be briefly stated as follows: that the authority exercised by the assessors, commissioners, county court, etc., under Act 338 of the General Assembly of Arkansas of 1915, being a law providing for the formation of road improvement districts, as such Act was construed by them, and the assessment made in pursuance of such authority, were invalid because repugnant to the Constitution of the United States; that the decision of the highest State Court was in favor of the validity thereof; that plaintiffs-in-error contended that the assessment of benefits made under the authority of said Act against their railroad right of way, as so construed, was relatively unfair and discriminatory because not made on a uniform basis with the assessment of other property, and was also grossly excessive; all in violation of the due process and equal protection clause of Section 1 of the 14th Amendment to the Constitution of the United States.

Defendant-in-error, on pages 23-29 of its brief, appears to claim that the objections to the assessment of benefits against the property of the railway companies on a mileage basis, the division of farm lands contiguous to the highway into zones, and a graduated assessment of benefits thereon, and the disregarding of improvements on the city and farm lands, were State questions as distinguished

from Federal questions. But if the necessary result of the same, as actually applied in this case, was to constitute in fact a denial of rights under Section 1 of the 14th Amendment to the Constitution of the United States, the same did constitute Federal questions, as this Court has many times held, and it will look into such matters sufficiently to determine whether or not, as matter of fact, a Federal question is involved.

The question of such repugnancy to Section 1 of the 14th Amendment to the Constitution of the United States was raised in the objections which were filed in the county court (Rec., 28-29) and constantly urged in the subsequent proceedings (Rec., 30-32; 87-88).

2. Defendant-in-error states that plaintiffs-in-error confined themselves to a contention that the assessment of benefits was confiscatory because the property of plaintiffs-in-error received no benefit whatever. For instance, defendant-in-error says, on page 9 of its brief, "There was no word of testimony about the assessments being arbitrary, unfair, oppressive and confiscatory."

Plaintiffs-in-error did, however, also contend that the assessment of benefits against their property was excessive, and relatively unfair—relatively unfair because the assessment against their property was made on a different basis from the basis used in assessing city and farm property.

The assessment was filed in the county court of Little River County on August 5, 1918, and thereupon notice was published that a hearing upon said assessment would be had on August 23, 1918. Within the time allowed by law, the plain-

tiffs-in-error filed their objections to the assessment (Rec., 23-29), wherein, amongst other objections to said assessment, they stated that the property of the plaintiffs-in-error would not be enhanced or benefited in any manner, and that said assessment was unreasonable, arbitrary, unjust and unlawful against the property of plaintiffs-in-error and contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States, and that "the attempted assessment of benefits is arbitrary and unreasonable and unjust for the further reason that the said railroad companies own an acreage of real property in said district amounting to approximately 121.4 acres, whereas the total acreage in said district amounts to 28,160 acres approximately. This is such an unreasonable discrimination as makes the attempted assessment of benefits illegal and void and contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States," and that "The said attempted assessment of the total sum against all of the property amounts to \$309,376.00, and assesses benefits against the property of said railroad companies amounting to \$67,900.00. The said railroad companies are not benefited and their property is not benefited and this is therefore an illegal and unlawful discrimination against the property of the said railroad companies." Said assessment having been approved by the county court, the plaintiffs-in-error thereupon, on said August 23, 1918, filed their petition, affidavit and bond for appeal to the circuit court, repeating the same objections (Rec., 30-32, 129). Thereafter, said cause was heard on appeal in the circuit court of Little River County, and said assessment was confirmed by said circuit court. Testimony on the matter

referred to was introduced. For instance, see Record, page 139. Motion for new trial was duly filed, and exceptions saved to the overruling of the same (Rec., 87-88). Plaintiffs-in-error prosecuted their appeal from said judgment of the circuit court of Little River County to the Supreme Court of Arkansas in due time.

These questions were considered by the Supreme Court of Arkansas, the three Judges concurring in the prevailing opinion saying:

This leaves only for consideration the question of the correctness and fairness of the assessments. * * *

This case was heard on oral evidence adduced by both parties to the controversy, and the testimony is conflicting. That adduced by appellee tends to show that the assessments were fair and uniform. It would serve no useful purpose to discuss the testimony in detail, for we find it to be legally sufficient to sustain the judgment of the circuit court. * * *

It is contended that the evidence shows that the benefits were not assessed uniformly, in that private property was not assessed in the same proportion as railroad property. The testimony of the assessors shows that they considered all the elements which entered into the question of benefits or enhancement of values, and we cannot say that appellant has been discriminated against in the assessment of its property, or that the fairness of the assessments, as a whole, is not sustained by legally sufficient testimony (Rec., 191-194).

The opinion of the two dissenting Judges (*The K. C. S. Ry. Co. vs. Road Improvement District No. 6*, 139 Ark., 424) was as follows:

HART, J. The proposed district contains 23,585 acres of land, not including the right of way of the railroad company. The proposed highway is for the most part close to the right of way of the railroad and parallel to it. The highway is about 11 miles long, and 9.7 miles of the right of way of the railroad is included in the district. The cost of the road is estimated at \$112,077.74. The benefits assessed against the property of the railway company are \$7,000 per mile, making a total assessment of benefits against the property of the railroad company of \$67,900. It is not shown that the proposed road will be of any advantage in draining the roadbed of the railroad company.

Judge Wood and the writer are of the opinion that the assessment of benefits against the railroad company is greater than the actual benefits to the property of the company. The statute provides that the county court shall hear and determine the justness of any assessments of benefits, and that it is authorized to equalize, lower, or raise any assessment upon a proper showing to the Court. Therefore Judge Wood and the writer are of the opinion that the assessment of benefits against the property of the railroad company are greater than the actual benefits, and should have been lowered, and that the judgment of the circuit court was erroneous in not doing this.

3. With reference to tables contained on pages 84-87 of the brief of defendant-in-error, making a comparison between the assessment of benefits against the railroad property and city and farm property, attention is called to the fact that while it is true, as stated in the testimony, that railroad property is assessed at about fifty per cent. of its value, yet the assessment of farm lands is on a much lower basis. Joel Mills, witness for defendant-in-error, testified (Rec., 162), that the land in the district is worth anywhere from \$20 per acre up. Defendant-in-error states in its brief that the road improvement district contains approximately 24,000 acres of land, which at \$20 per acre would be worth \$480,000. Yet the assessed value for general taxation of all farm lands and all city lands in the town of Wilton is only \$111,935 (Rec., 178), so that it is clear that the lands are assessed for less than 25 per cent. of their value; and it may be said that the estimate of \$20 per acre is very conservative.

The disproportion shown on the assessment roll (Rec., 52-112), between assessed value for taxation and benefits assessed also demonstrates this. For instance, on page 55 of the Record it appears that land which has an assessed value for the purpose of general taxation of \$200 has been assessed benefits in the sum of \$684; land having an assessed value for taxation of \$320 has been assessed benefits of \$960; which would clearly be an outrageous assessment if the assessed value for purposes of general taxation was anywhere near the real value of the property. The comparison contained in the tables on pages 84-87 of defendant-in-error's brief is therefore not of much significance.

4. Defendant-in-error in its brief also urges that while the railway companies have been assessed benefits in the sum of \$67,900, there is no prospect that taxes to the full amount of the assessed benefits will be levied, since the estimated cost of the construction of the road is \$110,000 and the total amount of benefits assessed is \$309,376. This argument is without merit. In the first place, a gravel road 11 miles long will probably cost more than \$10,000 a mile. In the second place, the road is to be built with the proceeds of bonds issued on the strength of these assessments. These bonds will draw at least five per cent. interest, and the amount of interest is, of course, to be added to the amount of the principal. The road may wear out and have to be reconstructed long before the bonds become due.

It has been the experience in connection with these districts that as a rule they not only collect all the assessment but generally apply to the legislature for power to collect additional assessments. In this Alexander Act provision is made for the collection of additional assessments (see Section 24 on page 4121 of the Acts 1915). It is there expressly provided that if the levy shall prove insufficient, the board must report the deficiency to the county court, and the county court must make another levy. The county court has such power continuously to make such levies until total assessments sufficient to pay for the improvement have been collected. (See also Section 18 and 19 of the same Act.) It is also a fact, as the Court judicially knows, that some taxpayers fail to pay their assessments, and such deficiencies must be made up by levies upon the solvent taxpayers. The cost of upkeep and repairs of such a road is heavy,

and it would not be at all surprising if additional legislation was secured enabling the county court to levy assessments for the purpose of maintaining the road.

5. Defendant-in-error in its brief (Rec., 4-5) calls attention particularly to the fact that the railway companies made no objection to the formation of this district and only objected after the assessment was made. It would appear that this is to their credit, instead of being a subject of just criticism, since it shows a disposition on their part not to hamper a public improvement if they received fair treatment. As stated in defendant-in-error's brief, the railway companies are voluntarily paying assessments for other road districts in the same neighborhood without a contest. When it became necessary to resist this assessment, on account of its excessiveness and unfairness, the railway companies naturally urged all the objections which appeared available. The objections to the organization of the district—the exclusion of property in the town of Ashdown, for illustration—were certainly meritorious. These objections (since they are, in this case, "State" questions) are foreclosed by the decision of the Supreme Court of Arkansas in this case, although that decision appears to be in conflict with its previous decision in the case of *Lee Wilson & Co. vs. Road Improvement District No. 1*, 127 Ark., 310.

6. Defendant-in-error, on pages 42 and 100 of its brief, speaks of the railroad of the St. Louis and San Francisco Railroad Company at Ashdown as only a branch line. There is nothing in the Record on this subject, and it is probably unneces-

sary to mention the fact that this branch line, if it is a branch line, is a part of the St. Louis and San Francisco Railroad, a large system which is one of the most important competitors of the plaintiffs-in-error.

ARGUMENT.

I.

The application to the conceded facts of this case of the rule of Branson vs. Bush, relied upon by defendant in error, leads inevitably to the conclusion that the assessment in this case is so plainly arbitrary and so grossly excessive as to amount to a confiscation of the property of the plaintiffs-in-error.

It is undoubtedly true, as this Court said in Branson vs. Bush, 251 U. S., 181, that anything which develops the territory that a railroad serves must necessarily be of benefit to it, and that no agency for such development equals that of good roads. It is also a matter of common experience that in many instances good roads have the effect of diverting traffic from railroads to motor vehicles. In the case of the highway in question, it would be natural to expect that some traffic which would otherwise be shipped at Wilton, will be brought into Ashdown and there turned over to the Frisco, or the Memphis, Dallas & Gulf. What the resultant of these two forces would be, it is, of

course, impossible to state with any assurance of accuracy.

Let us assume, however, for the sake of the argument, that balancing the traffic diverted from the carrier against that which it would gain by the construction of the highway, there will be a net balance in favor of the latter; in other words, that there will be a net increase in freight or passenger earnings, or both, caused by its construction. It is not claimed, either in the evidence or in argument of counsel, that any benefit will accrue to the railroad except such as arises from this theoretical and prospective increase in traffic. It is obvious that the physical property of the railroad, consisting of its right of way, tracks and station building within the district, will not be in any way benefited by the improvement. Its value will not be enhanced.

The precise question, therefore, is whether this assumed increase in traffic, caused by the construction of the highway in question, will so enhance the value of the *railroad within the district* as to justify an assessment of \$67,900.

It is claimed by many interested in railroad valuation that earnings or earning power should be given little or no consideration in the determination of value. They argue that value depends upon rates, and rates depend upon value; and hence it is reasoning in a circle. But it is our understanding that this Court has held otherwise in *Branson vs. Bush, supra*. It is said, quoting from the *Backus* case, 154 U. S., 439, 445:

But the value of property results from the use to which it is put and varies with the pro-

fitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another.

It is difficult to escape the conclusion, therefore, that an increase in profitable traffic, moving under rates fixed by public authority as reasonable for the service performed, will result in an increase of the value of the property. "For each separate use of one's property by others," says this Court in the *Monongahela* case, 148 U. S., 312, "the owner is entitled to a reasonable compensation, and the number and amount of such uses determines the productiveness and the earnings of the property, and therefore largely its value." * * * "The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner." The same rule is adhered to in *Cotting vs. Godard*, 183 U. S., 79, and *Canada Southern Ry. Co. vs. International Bridge Co.*, L. R., 8 App. Cas., 723, 731.

Assuming, therefore, that increased earnings make for increased value of railroad property, and assuming, further, that the construction of the public highway in question will theoretically and perhaps actually increase, to some extent, the traffic

of the railroad, and hence increase, to some extent, its value, will the enhancement in value of the railroad *within the district* be sufficient to justify the assessment made against its property? On the other hand will an analysis of the situation, guided by these principles, amount to a complete demonstration that the enhancement in value of the railroad within the district is so trifling and infinitesimal as to make the assessment a mere travesty? It is our insistence that this latter alternative represents the view which must govern the disposition of this case, and this we now proceed to consider.

It is fundamental that no benefit can be assessed against property outside of the road improvement district. "To do so under any formula," said this Court in *Union Tank Line vs. Wright*, 249 U. S., 274, "would violate the due process clause of the 14th amendment." The same principle finds ample illustration in *Fargo vs. Hart*, 193 U. S., 490. Under the express terms of Section 11 of the Act in question, the assessment of benefits is limited to the "railroads and other property *within the district* by reason of the improvement." No doubt the property of other persons outside of the district may be benefited, but no assessment is to be made against it. As an illustration, the property of the Frisco which is operated through Ashdown, will receive benefits as great, if not greater, than those received by the plaintiffs-in-error but its property is outside the limits of the improvement district, and hence no assessments may be made against it.

The final question, therefore, is, will there be any enhancement in value of the railroad's property *within the district*, caused by the proposed road improvement, sufficient to justify the assess-

ment made? The enhancement in value within the district must equal the amount of the assessment (see authorities cited in our first brief, page 67). Otherwise the company's property is taken for public use without compensation.

The effect of increased traffic, due to the construction of this highway, cannot, in the nature of things, be limited to the railroad property within the district. The segment of road in the district is "a part of the railroad unit" (*Branson vs. Bush, supra*). The value of the property of the railroad necessarily rises and falls as a unit. As this Court said in *Branson vs. Bush*:

It is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another.

To take an extreme illustration, assume the discovery of oil, in large quantity, adjacent to the track of the railroad in Little River County, Arkansas, and the sudden and extraordinary increase in traffic that would be occasioned thereby. This would not increase the value of the railroad adjacent to the oil well, over and above any other piece of track in the railroad system. The earnings from this traffic would be enjoyed by the railroad as a unit, and whatever increase in value might be occasioned thereby would be spread over all the mileage under one operation and control.

This Court said in the *State Railroad Tax* case, 92 U. S., 579, 608, quoted in *Branson vs. Bush, supra*:

It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road and apportion the value within the county by its relative length to the whole.

"Every mile," said this Court in *Fargo vs. Hart, supra*, "is a necessary condition of the use of the rest of the line beyond, and therefore a reflex condition of the value of the line behind it."

The assessment of railroad property for State and county purposes by the State of Arkansas recognizes that the value of the entire railroad is a unit, and it assesses within the State, and within each political subdivision, that portion of the value which the mileage bears to the entire mileage. In 1911 (Acts, Arkansas, 1911, page 233), the State enacted a law for the assessment and taxation of all property, tangible and intangible, of railway companies. In Section 1, it is provided that the Tax Commission

shall ascertain the value of all property, tangible and intangible, including the franchises (except the right to be a corporation), railroad tracks, rolling stock, etc.

Section 2 provides:

The franchises (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of such franchises shall be consid-

ered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible.

The valuation of \$27,000 per mile, used by the assessors in this case, represents the Arkansas mileage proportion of the entire value of the system. "There are," as this Court said in *Louisville & Nashville R. R. Co. vs. Greene*, 244 U. S., 522, 540, "two recognized methods, known as the stock-and-bond plan and the capitalization-of-income plan" of determining the value of railway property as an entirety. After this value has been ascertained, it becomes a simple problem to assign to the State of Arkansas and to its several subdivisions their proportion of value on a mileage basis.

Assuming an increase in traffic at Wilton and Ashdown, by reason of the proposed highway (which is a doubtful assumption), and that such traffic will be profitable, and that the result will be to increase the value of the entire railroad property, 800 miles long, and bearing in mind that only the enhancement in value within the district itself can be assessed with benefits, we proceed to inquire how much increase in traffic the railway company will have to realize, from that source, in order to justify the proposed assessment.

Let us assume, for purposes of illustration, that the company will enjoy an increased annual gross revenue at Wilton and Ashdown (the only stations in the district), due entirely to the construction of

the proposed highway, of \$1000 per year (which is probably excessive), and that the operating ratio is 75 per cent., i. e., of each dollar of gross revenue, seventy-five cents represents expenses and twenty-five cents represents net revenue or profits. There would result a net revenue, or profit, of 25 per cent. of this gross revenue, amounting to \$250 per year. This net revenue, or profit, would necessarily be spread over the entire mileage of 800 miles. The segment within the district, 9.7 miles long, is 1.21 per cent. of the entire mileage. The amount of net earnings, or profits, assignable to the 9.7 miles within the district (1.21 per cent. of \$250), would be \$3.02. If we capitalize, at 6 per cent., these net earnings, or profits, amounting to \$3.02, in order to ascertain the value which they may be said to represent, the result is \$50. This would represent the increased value of the 9.7 miles of railroad property within the district, arising from an annual increase of \$1000 in freight and passenger gross revenue at Wilton and Ash-down.

If we assume that the annual gross revenue from traffic in the district is increased tenfold over the sum used in the foregoing illustration, the result would be an enhancement in value of the railroad property within the district of \$500.

If we assume an increased annual gross revenue of \$100,000 due to the improvement (which, of course, is so large as to be absurd), this would represent an enhancement in value of the railroad property within the district of \$5000, which is slightly over 7 per cent. of \$67,900—the amount of benefits actually assessed.

Let us now take the assessment of \$67,900, which, if valid at all, must necessarily represent an enhancement in value of the 9.7 miles of railroad property within the district by the proposed road improvement. This sum, \$67,900, represents the enhancement in value of 1.21 per cent. of the entire line, so that the enhancement in value of the entire road by reason of the increase in business due to increased traffic caused by the proposed highway, would be 100 per cent., or \$5,600,000. In this connection it is important to bear in mind that the population of Ashdown is given as 2100 (brief of defendant-in-error, page 15). The population of the town of Wilton is not given, but its assessed value is \$18,625 (Rec., 178). The assessed value of all the property within the district is \$462,402 (Rec., 178).

We earnestly contend that, under these circumstances, it is nothing short of a travesty to sustain an assessment of \$67,900 against the property of the plaintiffs-in-error. It is fully recognized that in making local assessments certain inequalities will necessarily arise, due to the very nature of the proceeding, which it is not the policy of the law to undertake to rectify. But this is not an inequality of that character. It is a gross, glaring injustice, which comes clearly within the rule of *Norwood vs. Baker*, 172 U. S., 269; *Myles Salt Co. vs. Iberia Drainage Dist.*, 239 U. S., 478, and *Gast Realty Co. vs. Schneider Granite Co.*, 240 U. S., 55. It is, to quote the language of this Court in *Branson vs. Bush*, *supra*:

a flagrant abuse, and by reason of its arbitrary character the mere confiscation of particular property.

The assessors were acting under Section 11 of the Alexander Law, which required them to

assess the benefits to be received by the several and particular tracts of land, railroads, tramroads, and other real property within the district by reason of the improvement.

The law gave them no standard or guide by which to proceed. They were not instructed to make their assessments on an area basis, or an assessment basis, or a valuation basis, or to include or exclude improvements, or to assess benefits to railroad property in accordance with enhanced values arising from increased traffic caused by the proposed improvement. They were without chart or compass, and with no guide except their own uncontrolled discretion. It is no wonder, therefore, that they adopted the area basis for farm lands and an entirely different basis for railroad property. No one knows how they arrived at \$7,000 a mile. They, themselves, do not undertake, in their testimony, to disclose the process. Probably there was no process except a desire to give to the railroad company a generous share of the burden. It was an administration of the law which amounts to a violation of rights under the 14th Amendment. (*Myles Salt Co. vs. Board of Com'rs, supra; Raymond vs. Chicago Union T. Co.*, 207 U. S., 20.)

Is there a limit beyond which local assessment boards may not be permitted to go in the assessment of benefits against railroad property? If there is no such limit, then, in the present case, as well as in other similar cases, the assessors, if they had been so minded, could have assessed a dollar

or a penny against each tract of farm land and city property in the district and the remainder against the property of the railway company. Can railroad property thus be made to bear the entire burden of these public improvements?

It is respectfully submitted that the assessment should bear some reasonable relation to the benefits which the property is to receive from the proposed improvement. If it be conceded that an enhancement in value arising from increased traffic is a benefit, such enhancement should be measured in some rational way. It is not a compliance with the spirit of the law to "lump off" arbitrarily, or guess at the benefits which a railway company may be supposed to receive. This is particularly true when, as in the present case, the assessment actually made, when examined in the light of logic and reason, leads to the absurd conclusion that the improvement of this insignificant highway in Arkansas will result in increasing the value of the property of The Kansas City Southern Railway Company in excess of \$5,600,000!

The gross inequality which results, in practice, from an enforcement of the same law in adjoining counties affords a most cogent reason for placing some lawful and reasonable limit upon the unregulated discretion of assessors in assessing the property of railway companies with an increasingly larger proportion of the cost of public improvements. In the present case the assessed benefits were \$7,000 per mile. In the neighboring county of Lafayette, in the same State, and acting under the same law, the benefits assessed against the St. Louis Southwestern Railway Company were \$2000 per mile of main line; \$1000 per mile for side tracks,

and \$1500 per mile on the Shreveport branch (*St. L. S. W. Ry. Co. vs. Com'rs.*, 265 Fed., 524, 528). The total assessment was \$49,706. The District Court of the United States reduced the assessment to \$54 per mile. The aggregate assessment was reduced from \$49,706 to \$10,485. These two proceedings were under the same law. Each was for the construction of a public highway. The same procedure was employed in both. In one case, the assessed benefits are \$7,000 per mile, and in the other case, \$54 per mile.

This shocking inequality of treatment of two railway companies, in the same state, in neighboring counties, under the same law, cannot fail to impress the Court with the gravity and seriousness of the unfortunate predicament of the plaintiffs-in-error. It is inevitable, from the very fundamentals of human nature, that the assessors in a local improvement district who are themselves property owners within the district, will be generous in lightening the burdens of individual property owners and transferring them to railroad and other public utility property. It may safely be assumed that this spirit of generosity will increase until practically the entire burden will rest upon the railway companies, unless some authoritative rule is laid down which shall define limits beyond which this unequal distribution of burdens may not go.

The interest of the railway companies is not limited to this one proceeding. It is a matter of general knowledge that not only Arkansas but other states have embarked upon an extensive program for road improvement. However commendable this movement may be, its burdens should be distributed with some semblance of fairness and justice. In

the past unequal and discriminatory assessments have been placed upon railway property, and, in the main, they have been paid in full or paid as a result of a compromise; but the inequalities and discriminations appear to be increasing, and doubtless will continue to increase in the future unless some lawful limit shall be established. In this particular district other public highways may be constructed and further doubtful benefits be conferred upon the property of the plaintiffs-in-error. Still other improvement districts may be created in other portions of the state, as well as in adjoining states, and other highways projected and constructed. It is a subject of great importance not only to plaintiffs-in-error but to all common carriers located in a country in progress of development.

If there is no limit to the unregulated discretion of assessors in imposing burdens in the way of alleged benefits upon common carrier property, it is important that this be authoritatively declared. On the other hand, if the contributions to be made by common carriers to the cost of road improvements are to be limited, as near as may be, to the actual benefit or actual enhancement in value of their property within the district, it is equally important that that fact should be authoritatively determined, and the present case affords justification for our request that this be done.

II.

The assessment of benefits to farm and city property on an area basis, and to railway property on a different and higher basis, violated the Due Process and Equal Protection Clauses of Section 1 of the 14th Amendment.

An inspection of the assessment record (Rec., 52-112), shows clearly that both farm and city property was assessed benefits solely on the basis of the area of each tract of land and the zone within which it was located.

The zones, for farm land, were numbered 1 to 5, depending on their distance from the highway; land in zone 1, nearest the highway, was assessed benefits at the rate of \$12 per acre; zone 2, \$10 per acre; zone 3, \$8 per acre; zone 4, \$6 per acre; and zone 5, \$4 per acre (Rec., 169, 173).

In the town of Wilton, the assessment was by lots, lots in zone 1, of the zoning system for the town, being assessed \$25 each; in zone 2, \$20; in zone 3, \$15; and in zone 4, \$10 (Rec., 82-109).

As to both farm and city property, the assessment of benefits, in each zone, was uniformly the same amount per acre or per lot, without regard to market value, assessed value, or whether the property was improved or unimproved. A casual inspection of a page or two of the assessment record (Rec., 53-110), clearly demonstrates this. The testimony, moreover, is to the same effect (Rec., 173, 174).

In assessing railroad property, however, the area basis was not used. The assessment was made

upon a different and a much higher basis. It might be more accurate to say that it was made without any basis whatsoever.

The acreage of the right of way of the plaintiffs-in-error, in the district, amounted to 130 acres (Rec., 149), and at the rate used in zone 1, for farm land, \$12 per acre, the assessment of benefits on the acreage basis would have amounted to \$1560, as against the assessment actually made of \$67,900.

The improvements on the right of way, and supposed benefit to the business of the railroad were apparently taken into consideration (Rec., 174), whereas other property was uniformly assessed a certain sum per acre, or lot, regardless of improvements or the use to which the property was put.

Railroad property was assessed the same amount regardless of the zone in which it was located, whereas the zone system was used in assessing all other property, except pipe lines and telegraph lines.

We insist that, if there was to be a purely conventional distribution of the burdens of the construction of this road by area, the same measuring stick should have been used with regard to railroad property; and if the assessment was to be by a determination of actual benefits to railroad right of way, such benefits to each particular piece of farm land and each city lot should also have been assessed. The plaintiffs-in-error, therefore, were grievously injured by not having their right of way assessed on an acreage basis. They were entitled to have it so assessed, when other property was being assessed on that basis. Such an arbitrary and discriminatory method of assessment is in conflict with Section 1 of the 14th Amendment.

It is recognized that, subject to the proviso that the assessment shall not exceed the benefits, the assessment may be by any one of several methods. As stated in *Houck vs. Little River Drainage Dist.*, 239 U. S., 254:

The State in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners.

But this does not mean that a part of the property may be assessed on the basis of area and another part on a different and more burdensome basis. No authority can be found which permits the assessors arbitrarily to intermingle different bases in the same benefit district. It would not be contended that they, in the instant case, could apply the area basis to farm and city property west of the railroad, the assessed-value-without-improvements basis to farm and city property east of the railroad, and the assessed value-with-improvements basis to the railroad property itself. We submit that the intermingling of different bases in the present case was arbitrary and unwarranted, and operated as a denial of the equal protection of the laws.

As stated in *Indiana R. Co. vs. Connelly*, 10 Ohio St., 160:

The rule of apportionment, whether by the front foot or a percentage upon the assessed valuation, must be uniform, affecting all the owners and all the property abutting on the street alike.

In the case of *Raymond vs. Chicago Union Traction Co.*, 207 U. S., 20, 52 L. Ed., 78, the third syllabus (as contained in the L. Ed.) is as follows:

Assessing the franchises and other property of certain corporations at a different rate and by a different method from that employed for other corporations of the same class for the same year, which results in enormous disparity and discrimination, denies the due process of law and equal protection of the laws protected by U. S. Const., 14th Amend. against impairment by a State.

The naked land itself of the railway companies, if no regard was paid to the improvements thereon or the use made of it, was, if benefited at all, benefited in no different and no greater degree than the land of the other property owners in the district. If the land of the other property owners was to be considered without regard to improvements and without regard to use, as the assessment roll shows that it was considered, there was no basis for treating the land of the railroad companies in any different manner.

Defendant-in-error in its brief attempts to justify the different treatment of the property of the railway companies on the familiar ground of classification; but, as stated, the classification must depend upon real differences, and there was no difference between the naked land of the railroad company and the naked land of the other property owners, when considered without regard to improvements or use. In the recent case of *Royster Guano Co. vs. Virginia*, 253 U. S., 412, it is said:

It is unnecessary to say that the "equal protection of the laws" required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation. * * * But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

In the case of *Gast Realty & Investment Co. vs. Schneider Granite Co.*, 240 U. S., 55, 36 Sup. Ct. Rep., 254, the validity of a special assessment for paving a street in the city of St. Louis, Mo., was involved. The charter of St. Louis provides that one-fourth of the total cost shall be levied upon all the property fronting upon or adjoining the improvement according to frontage and three-fourths according to area upon all the property in the district. As a result of the plan provided for in the charter, on one side of the street there were some very shallow lots and the boundary of the district ran back only to the rear of those lots, while on the other side, as there was no parallel street, the district ran to a much greater depth. In holding such a plan repugnant to the 14th Amendment, the Court said :

The legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse. *Houck vs. Little River Drainage Dist.*, 239 U. S., 254, 262, 60 L. Ed., 523, 36 Sup. Ct.

Rep., 58. The front-foot rule has been sanctioned for the cost of paving a street. In such a case it is not likely that the cost will exceed the benefit, and the law does not attempt an imaginary exactness, or go beyond the reasonable probabilities. * * *

But, as is implied by *Houck vs. Little River Drainage Dist.*, if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact. *Martin vs. District of Columbia*, 205 U. S., 135, 139, 51 L. Ed., 743, 744, 27 Sup. Ct. Rep., 440.

It must be apparent in this case that substantial justice will not be done, but, on the contrary, the properties of the railway companies and of others in the district will be taxed disproportionately to each other and to the benefits conferred. The arbitrary and unequal distribution of burdens is much greater in the instant case than in the *Gast Realty* case, from which the foregoing quotation is taken.

It should be borne in mind that this is not a case where, as in *Branson vs. Bush*, *supra*, the assessment of benefits to railroad and farm property alike was made on the basis of the assessed value for state and county purposes. Section 5 of the Act of 1911, which was the Act under which the assessment was made in the *Branson* case, in addition to that portion quoted in the opinion of the Court, contains the following:

And the said commissioners are authorized and directed each year to levy upon said land an amount sufficient to pay the necessary expenses of the district for that year, and all interest and principal of bonds maturing, and all installments of the sinking fund, if any such there be, which assessment is to be collected from the owners of real property, railroads and tramroads in the manner hereinafter provided, *and in proportion to their respective assessments as shown by the then last county assessment.*

Not only was the assessment for state and county purposes not made the basis of assessment in the present case, but it would have imposed a most unjust burden on the plaintiffs-in-error if this had been done, for the reasons, first, any benefits which they may derive in the future from increased traffic due to the proposed improvement could not, by any stretch of the imagination, be proportionate to the assessed value of the property within the district, and, secondly, it appears from the record in this case that the assessed valuation for state and county purposes of farm and city property is less than twenty-five per cent. of its actual value, while railroad property is assessed at fifty per cent. of its actual value.

Defendant-in-error mentions, on page 15 of its brief, that since this litigation arose, the legislature of Arkansas passed a special act that validated and confirmed the assessment of benefits imposed on property within the district.

Any such act could not, however, validate an assessment that is repugnant to the provisions of

the Constitution. In the case of *Thibault vs. McHaney* 119 Ark., 188, the Supreme Court of Arkansas said :

Where the uncontroverted facts show, as they do here, that the estimated cost of the improvement contemplated, exceeds the benefits to be derived therefrom, an Act of the legislature validating an assessment for such improvement would be arbitrary and unconstitutional.

Peavy vs. City of Little Rock, 32 Ark., 31 ;

Coffman vs. St. Francis Drainage Dist.,
83 Ark., 54 ;

Kirst vs. Street Imp. Dist., 86 Ark., 1.

**It is respectfully submitted that
the judgment of the Supreme Court
of Arkansas should be reversed.**

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